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No. 93-

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IN THE

Supreme Court of the United States

October Term 1993

PHYLLIS MILLER,

Petitioner,

v.

DINO LA ROSA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the agent of an employer can be held personally liable for his or her discriminatory conduct in violation of Title VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act.

LIST OF PARTIES PURSUANT TO SUPREME COURT RULE 14.1(b)

Dino La Rosa

Carlo Galazzo

Don Bohn

Bui Duc Huy

Robert Stewart

Donald Schupak

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IN THE

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PHYLLIS MILLER,

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v.

DINO LA ROSA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Phyllis Miller respectfully prays that the Supreme Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 19, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 991 F.2d 583, and is reproduced as Appendix A. The order of the district court dismissing Miller's Third Amended Complaint is not reported, and is reproduced as Appendix B. The judgment of the district court was entered on May 18, 1990, and is reproduced as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on April 19, 1993. Petitioner filed a timely petition for rehearing and suggestion of rehearing en banc on June 4, 1993, which was denied on July 28, 1993. (App. D-1)

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTORY PROVISIONS INVOLVED

Section 701(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, provides in pertinent part:

> The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . *Provided*, That during the first year after the effective date prescribed in subsection (a) of Section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such a date, persons having fewer than fifty employees (and their agents) shall not be considered employers.

Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3, provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 4 of the Age Discrimination in Employment Act, 29 U.S.C. § 623, provides in pertinent part:

> (a) Employer practices. It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Section 11 of the Age Discrimination in Employment Act, 29 U.S.C. § 630(b), provides in pertinent part:

> (b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

STATEMENT OF THE CASE

From 1982 to 1986, petitioner Phyllis Miller was employed at Maxwell's Plum Restaurant ("Maxwell's Plum") in San Francisco, California. During that time, Maxwell's Plum's supervisory personnel repeatedly discriminated against her on the basis of her age and gender, denying her promotions and admission to training programs and creating a hostile work environment.[1]

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[1] Because Miller's complaint was dismissed for failure to state a claim, the facts recited herein are drawn from the complaint, and must be taken as true for the purposes of this petition. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 80 n. 3 (1981).

Miller applied for a management training position at Maxwell's Plum in August, 1982 at the age of 44. She was hired as a hostess by Dino La Rosa ("La Rosa"), then general manager of Maxwell's Plum. Third Amended Complaint at 2, ¶ 5 (App. E-2). Although she had over ten years of successful management experience (App. E-8, ¶ 37), she accepted the lower-paying hostess position because she was told that she would be promoted to a management training position when such a position became available. (*Id.*, ¶¶ 35-36) However, over the next few years, although La Rosa told Miller that her "work performance was excellent", (*id.*, ¶ 39), he repeatedly promoted males with equal or less management experience over Miller to positions at the "front of the house".

In January, 1984, La Rosa, under the direction of Donald Schupak ("Schupak"), the President, Chairman and CEO of Maxwell's International, Inc., the company that ran Maxwell's Plum (App. E-3, ¶ 10), reduced Miller's hours because of her sex and age. (App. E-3-E-4, ¶ 13) Miller's hours were given to a male who was under the age of forty, while Miller was assigned to answer telephones in the basement of the restaurant. (*Id.*) Miller was also discriminatorily denied promotion to dining room director. (App. E-8-E-9, ¶¶ 40-41) At Miller's request, the Hotel and Restaurant Employees and Bartenders Union Local 2 ("Local 2") intervened on her behalf, and she was paid for the hours she should have worked. (*Id.*) Subsequently, La Rosa and other employees of Maxwell's under Schupak's direction willfully created a hostile working environment for Miller on the basis of her age and sex and in retaliation for her complaint.[2] (App. E-4, ¶ 14-18)

Throughout the spring of 1984, La Rosa, under Schupak's direction, continued to deny Miller promotions and a full work schedule, because, as La Rosa told her, she was "too old", and

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[2] Miller was compelled once again to seek Local 2's intervention. *Id.* at 4, ¶ 18. The parties agreed that Local 2 would not file a grievance if La Rosa would destroy false letters he had written regarding Miller's job performance, and cease otherwise harassing Miller. *Id.*

"almost ready to retire and get social security." (App. E-5, ¶ 21) When Miller asked La Rosa why she was being passed over for management positions, he answered, "I've tried women before and they're nothing but trouble and I'll never do it again." (App. E-9, ¶ 42) He advised her to "go home and get a rich husband again." (App. E-5, ¶ 21) La Rosa also distributed Miller's hours to other employees with less seniority who were under the age of forty. In May or June, 1984, Carlo Galazzo, then Executive Chef of Maxwell's Plum, refused Miller management and culinary training because, he told her, she was "too old to waste time training for management." (App. E-5, ¶ 23) Galazzo told Miller that she was not being promoted because "in his country, it was embarrassing if women had to work". (App. E-9, ¶ 43) He and La Rosa also ridiculed her in front of other employees and customers about being "too old". (App. E-5, ¶ 24) La Rosa denied Miller's request to work as a banquet director because "girls would cause trouble". (App. E-9, ¶ 45) Finally, in July, 1984, La Rosa terminated Miller, and replaced her with an employee under the age of forty. (App. E-6, ¶ 27)

Miller filed charges with the Equal Employment Opportunity Commission ("EEOC") in July, 1984, and the National Labor Relations Board ("NLRB") in November, 1984. (App. E-6, ¶ 28) Local 2 also filed a grievance regarding Miller's termination in July, 1984. (*Id.*) On July 22, 1985, a panel of arbitrators ordered that Miller be reinstated with full back pay and appropriate benefits. (*Id.*) Miller was reinstated on October 14, 1985. (App. E-7, ¶ 31) Galazzo, who was by then general manager of Maxwell's Plum (App. E-2, ¶ 6), continued to harass her, however, and denied Miller a full work schedule, giving her hours to an employee under the age of forty. (App. E-6-E-7, ¶¶ 30-31) On October 30, 1985, Miller filed a second NLRB charge, alleging that she had been verbally harassed and denied a full work schedule in retaliation for filing EEOC and NLRB charges. (App. E-7, ¶ 32)

Upon receiving the charge, on November 8, 1985, Don Bohn, Maxwell's Plum's comptroller, and Bui Duc Huy, Maxwell's Plum's dining room director, told Miller that she was again terminated. (*Id.*) The next day Galazzo and Robert Stewart, the

dining room director (App. E-3, ¶ 8), gave Miller formal notice of her termination. (App. E-7, ¶ 32) Stewart, Galazzo and Bohn also refused to write letters of recommendation in retaliation for her charges. (App. E-7, ¶ 33) On November 18, 1985, Miller filed a second EEOC charge. (App. E-1-E-2, ¶ 2) She was temporarily reemployed by Maxwell's Plum in late December, 1985, when Galazzo was on vacation, but was laid off again in January 1986. (App. E-10, ¶ 31)

Sometime after March 17, 1986, an attorney representing Maxwell's Plum sent Local 2 a letter stating that Miller had been permanently fired in January. (App. E-10, ¶ 53) In the following year, Galazzo engaged in a series of retaliatory acts against Miller, including denying her unemployment benefits and giving false testimony at administrative hearings. (App. E-10, ¶¶ 54-55)

Miller filed suit in the United States District Court for the Northern District of California on April 24, 1987 alleging, among other claims, sex and age discrimination. She named as defendants both Maxwell's International and the individuals personally responsible for Maxwell's Plum's refusal to promote her, train her or grant her a full work schedule, La Rosa, Galazzo, Bohn, Huy, Stewart and Schupak. Maxwell's International had filed for protection under Chapter 11 of the Bankruptcy Code and in October, 1988, the bankruptcy court enjoined Miller from maintaining her action against Maxwell's International. *In re Maxwell's International, Inc.*, No. 83-B-11668 (Bkrptcy. S.D.N.Y Oct. 17, 1988).[3] (App. F-1) Thus, the only recourse for Miller was her action against her supervisors, the persons who had engaged in the discrimination against her.

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[3] To resolve a dispute concerning the restaurant's failure to pay Miller full back pay and appropriate benefits as required by the arbitration award of July 22, 1985, Miller and Maxwell's International on October 16, 1986 entered into a stipulation pursuant to which the restaurant paid Miller $24,000 in settlement of Miller's claims against Maxwell's International. The district court rejected defendants' argument that Miller's settlement of her action against Maxwell's International barred her suit against them (App. G-1) and defendants did not raise that issue in the Court of Appeals.

On April 4, 1989, Miller filed a First Amended Complaint against the individual defendants alone, alleging sex and age discrimination under Title VII and the ADEA. On July 26, 1989, the district court denied defendants' motion to dismiss the complaint, holding that under Title VII and the ADEA "the term 'employer' includes agents of the company for which the plaintiff works", and granted Miller leave to file a Second Amended Complaint alleging "what each defendant did and in what way that behavior was wrongful". (App. G-2) The court also held it was "not necessary for plaintiff to have named the individual management officials in her EEOC complaints so long as they had notice of her claims." (App.G-1) On January 17, 1990, the district court dismissed plaintiff's Second Amended Complaint without prejudice. Although it found the question "shrouded in uncertainty", the court held that managerial employees of a private employer may be held liable for back pay under Title VII and the ADEA. (App. H-2-H-3)

On February 5, 1990, Miller filed a Third Amended Complaint. Miller alleged that each individual defendant discriminated against her on the basis of sex and age and in retaliation for her complaints of discrimination. (App. E-2-E-3, ¶¶ 3, 11) She alleged that such conduct constituted sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621 ("ADEA"). (*Id.*) Miller requested an award of damages and such other relief as the court deemed just and proper.[4] (App. E-12, ¶¶ 67-69)

On May 23, 1990, the district court dismissed the Third Amended Complaint in its entirety. The court held that the

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[4] Miller also asserted a claim under the Equal Pay Act of 1963, 29 U.S.C. § 206(d), and state law claims for retaliation and emotional distress. The Court of Appeals held that Miller's claims for emotional distress were barred by the California statute of limitations, (App. A-6), and that her claim for violation of the Equal Pay Act was barred by the two-year statute of limitations for violations of that statute that do not involve willful conduct. (App. A-5) Miller does not seek review of those rulings.

complaint failed to state a claim against defendants Schupak, Huy, Bohn and Stewart because Miller "failed to link up [those defendants] with specific actionable conduct that has harmed her"; that the remaining Title VII claims against La Rosa and Galazzo should be dismissed because Miller named Maxwell's International and not the supervisory employees as a respondent in her EEOC charges; that Miller's ADEA claim against La Rosa was either barred by laches or by the statute of limitations; and that Miller's ADEA claim against Galazzo failed to state a claim upon which relief could be granted. (App. B-4-B-14). The court granted Miller's application for an extension of the time in which to file a motion for reconsideration (App. I-1), but on August 14, 1990, it denied Miller's motion for reconsideration. (App. J-1-J-2)

On April 19, 1993, a divided panel of the United States Court of Appeals for the Ninth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291,[5] affirmed the district court's judgment. (App. A-10) The court concluded that Miller's ADEA claims were timely because she adequately alleged a willful ADEA violation. (App. A-5) In addition, Miller "alleged a continuing pattern of ADEA violations that took place after she had filed her EEOC charges and the defendants knew their conduct was being challenged under the law." (App. A-5) The court also rejected the district court's use of laches to bar some of Miller's claims, because "the doctrine of laches is inapplicable when Congress has

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[5] Miller's notice of appeal was filed within 30 days of the order denying her motion for reconsideration but after 30 days from the original order dismissing her complaint. The Court of Appeals held that Miller's notice of appeal was timely under the "unique circumstances" doctrine of *Barry v. Bowen*, 825 F.2d 1324, 1329 (9th Cir. 1987), because Miller filed a motion for an extension of time within the time permitted for an appeal, the district court granted Miller's motion for an extension of time to file a Rule 59(e) motion while she still had time to notice an appeal from the original judgment and, relying on the court's order, Miller waited until after the disposition of the Rule 59(e) motion to notice her appeal. (App. A-3-A-4) *See Wolfsohn v. Hankin*, 376 U.S. 203 (1964); *Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384 (1964); *see also Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989) (*Thompson* applies "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done").

provided a statute of limitations to govern the action," (App. A-6), as it did under the ADEA.

Although disagreeing with the district court's grounds for dismissing some of Miller's claims, the court held that supervisory or managerial employees "have no personal liability under Title VII and the ADEA" and that Miller's only remedy was against her corporate employer, Maxwell's International. (App. A-7) The court found that "[t]he liability schemes under Title VII and the ADEA . . . both limit civil liability to the employer." (App. A-7) The court acknowledged that the term "employer" is defined under both Title VII and the ADEA "to include any agent of the employer" (App. A-7) (citing 42 U.S.C. § 2000e(b) and 29 U.S.C. §§ 630(b), 203(b)), and recognized that other courts have read that language to mean that "supervisory personnel and other agents of the employer are themselves employers for purposes of liability" under Title VII and the ADEA. (App. A-7). However, it rejected the holding of those courts.

The court considered itself bound by *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982), in which it had stated in *dicta* that "individual defendants cannot be held liable for back pay". *Id.* at 968. (App. A-8) The court also asserted that *Padway* "announced the better rule". (App. A-8) It reasoned that "the obvious purpose" of the provisions including agents within the definition of covered employers "was to incorporate respondeat superior liability into the statute". (App. A-8) (internal citations omitted) The court stated that holding agents of the employer liable under Title VII or the ADEA was inconsistent with the limitation in coverage of Title VII to employers with fifteen or more employees, 42 U.S.C. § 2000e(b), and the ADEA to employers with twenty or more employees. 29 U.S.C. § 630(b). (App. A-8) It also stated that holding supervisory employees liable was not necessary because "[n]o employer will allow supervisory or other personnel to violate Title VII when the employer is liable for the Title VII violation." (App. A-9)

Judge Fletcher dissented. (App. A-10) The dissent argued that while *Padway* stated that "the employer, not a mere employee . . .

should pay *back wages*" under Title VII, that decision should not be extended to bar injunctive relief under Title VII. (App. A-10) (emphasis in original) The dissent also noted that the Civil Rights Act of 1991 "may permit suits against individuals for compensatory and punitive damages where the discrimination was intentional". (App. A-10) Judge Fletcher stated that supervisors who took part in termination decisions could be held liable under the ADEA in their individual capacities. (App. A-12)

On June 4, 1993, Miller filed a timely petition for rehearing and suggestion of rehearing en banc. The EEOC, which had filed a brief as amicus curiae in support of Miller's appeal, also filed a brief in support of the petition for rehearing and suggestion of rehearing en banc. The EEOC noted that the panel had "issued a sweeping and unprecedented decision removing an entire class of defendants from coverage under Title VII and the ADEA". Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of the Petition for Rehearing with Suggestion for Rehearing En Banc, at i, *Miller v. Maxwell's International*, No. 90-16286 (9th Cir. June 4, 1993).[6] It urged the court to follow the other circuits which had held that agents of the employer, including supervisory personnel, could be personally liable under Title VII and the ADEA for their discriminatory conduct.[7] The court denied the petition for rehearing and rejected the suggestion of rehearing en banc without opinion on July 28, 1993. (App. D-1)

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[6] A copy of the EEOC's brief has been lodged with the Clerk of the Court.

[7] In light of the EEOC's participation in the Court of Appeals and the important Federal governmental interest in the effective enforcement of the employment discrimination laws, we suggest that the Court might want to request the Solicitor General to state the position of the United States.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT A COURT MUST FOLLOW THE PLAIN LANGUAGE OF A STATUTE AND GIVE MEANING TO ALL ITS TERMS.

This Court has held in a long line of cases that the "starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, [the statute's] language must ordinarily be regarded as conclusive.'" *Kaiser Aluminum & Chem. Corp. v. Bonjourno*, 494 U.S. 827, 835 (1990) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *see Patterson v. Shumate*, 112 S. Ct. 2242, 2248 (1992); *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). Moreover, this Court has frequently reiterated "that a statute must, if possible, be construed in such fashion that every word has some operative effect". *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992); *see also Mackey v. Lanier Collection Agency and Serv., Inc.*, 486 U.S. 825, 837 (1988); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used").

The Ninth Circuit's decision violates those cardinal rules of interpretation. The plain language of both Title VII and the ADEA subject the employer's agent who engages in discriminatory conduct to personal liability for that conduct. Section 703(a) of Title VII prohibits "an employer" from engaging in a number of specified discriminatory practices. "Employer" is defined by Section 701(b) of the Act as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . *and any agent of such a person*". 42 U.S.C. § 2000e(b) (emphasis added). In addition, Section 701(a), 42 U.S.C. § 2000e(a), defines "person" to "include[ ] one or more individuals". The corresponding provisions of the ADEA are identical in all relevant respects. *See* 29 U.S.C. § 623 (making it

unlawful for "an employer" to engage in discriminatory practices); 29 U.S.C. § 630(b) (defining employer as "a person engaged in an industry affecting commerce. . . . The term also means (1) any agent of such a person"); 29 U.S.C. § 630(a) (defining "person" to include "one or more individuals").[8] In this case, petitioner sued persons who undeniably were agents of her employer; those persons are encompassed in both Title VII's and the ADEA's definitions of "employer", and therefore are expressly subject to liability for their discriminatory acts.

The Ninth Circuit acknowledged that the plain-meaning interpretation of Title VII was "not without merit". (App. A-8) It rejected that interpretation, however, because it believed that the "obvious purpose" of the reference to agents was to make corporate employers liable for their agents' acts on a *respondeat superior* basis (App. A-8) and that the "statutory scheme itself indicate[d] that Congress did not intend to impose individual liability on employees" because it limited the coverage of employers who could be sued to those with fifteen or more employees under Title VII and twenty or more employees under the ADEA. (App. A-8)

The Ninth Circuit's interpretation effectively deletes the words "any agent of such a person" from the statute. The liability of corporate employers for their own discriminatory conduct and that of their employees is derived from Section 703(a) of Title VII and Section 4 of the ADEA which state that it shall be unlawful for the employer to engage in any of the proscribed discriminatory actions. Because a corporate or public employer can act only through its agents, *respondeat superior* liability is already implicit in those sections. Even if Congress had seen any need explicitly to confirm the availability of *respondeat superior* liability, it would have done so in Section 703(a) of Title VII and Section 4 of ADEA. Section 701(b) of Title VII and Section 11

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[8] This Court has noted that "the prohibitions of the ADEA were derived *in haec verba* from Title VII". *Lorillard v. Pons*, 434 U.S. 575, 584 (1978); *see Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 181 (1989); *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 123-24 (1988).

of the ADEA perform a different function. Those provisions define the "employer" who is subject to the proscriptions of Title VII and the ADEA respectively. Contrary to the Ninth Circuit's interpretation, they do not address the scope of liability of persons who are defined as employers.

The argument that the employee size limitations in Title VII and the ADEA are inconsistent with the imposition of personal liability on the agent of an employer covered by those statutes is a *non-sequitur*. Those limitations were not intended, as the Ninth Circuit believed, to protect "small entities [from] the costs associated with litigating discrimination claims". (App. A-8) Both Title VII and the ADEA subject "small entities", in particular employment agencies, to liability without regard to their size or the number of employees they have. *See* 29 U.S.C. § 630(a); 42 U.S.C. § 2000e(c). The limitations were intended to protect small businesses from Title VII and ADEA suits for hiring relatives and family friends. *See Armbruster v. Quinn*, 711 F.2d 1332, 1337 n.4 (6th Cir. 1983) (noting that limitations on the reach of Title VII to small employers were based on recognition that small businesses "often family run, would likely hire the friends and relatives") (citing 118 CONG. REC. 2409-10 (remarks of Sen. Fannin), 3171 (remarks of Sen. Ervin) (1972)); *Lamirande v. Resolution Trust Corp.*, C.A. No. 93-363-SD, 1993 U.S. Dist. LEXIS 14602, at *7 (D.N.H. Oct. 7, 1993) (size restriction "was intended to protect small family-run businesses from discriminatory hiring claims based on their preference for hiring friends and relatives"). Thus, the size limitations in no way suggest that Congress intended to immunize managers, supervisors and other agents from liability for engaging in discriminatory conduct.

Finally, the Ninth Circuit suggested that the language defining the employer to include agents of the employer could be ignored because, under that Circuit's holding in *Padway*, only the employer and not the agents of the employer can be liable for one particular remedy—an order to pay back pay. However, this Court has specifically directed against such an approach to reading Title VII, refusing "to interpret § 706(g)—a provision defining *remedies*—to influence the substantive commands of the statute".

Price Waterhouse v. Hopkins, 490 U.S. 228, 245 n. 10 (1989) (plurality op.). The scope of the district court's remedial powers under Title VII (and the ADEA) is broad. *See Teamsters v. United States*, 431 U.S. 324, 364 (1977). It includes numerous types of orders that can run against an individual supervisory employee, including injunctions and awards of nominal damages. *See Cuesta v. Texas Dep't of Criminal Justice*, 805 F. Supp. 451, (W.D. Tex. 1991) (enjoining supervisor from further engaging in sexual harassment under Title VII); *Pree v. Stone & Webster Eng'g Corp.*, 607 F. Supp. 945, 950 (D. Nev. 1985) (noting that plaintiff established entitlement to injunctive relief against supervisor prohibiting him from engaging in employment discrimination); *Showalter v. Allison Reed Group, Inc.*, 767 F. Supp. 1205, 1214 (D.R.I. 1991) (awarding nominal damages against supervisor).

Moreover, the argument that agents of the employer cannot be held liable for back pay is based on a faulty premise. The premise must be that because it is the employer that would have paid the employee's salary absent the discrimination, only the employer can be held liable for back pay. In fact, however, the courts have held that "employment agencies" and "labor organizations", which would not have paid the employee's salary, can be ordered to pay back pay even though they are not the employer. *See* Section 706(g), 42 U.S.C. § 2000e-5(g); *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 89 n.20 (1981); *Pegues v. Mississippi State Employment Serv.*, 899 F.2d 1449, 1453 (5th Cir. 1990); *Carey v. Greyhound Bus Co.*, 500 F.2d 1372, 1379 (5th Cir. 1974); *E.E.O.C. v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 585 (2d Cir. 1976). A similar result should follow when the agent of the employer is the person engaged in the unlawful discriminatory conduct.

Finally, as Judge Fletcher noted in dissent, the Civil Rights Act of 1991, which permits suits against individuals for compensatory and punitive damages, 42 U.S.C. § 1981a, "may permit suits against individuals for compensatory and punitive damages where the discrimination was intentional" (App. A-10), and the ADEA provides as a remedy liquidated damages in cases of willful violations. (App. A-11)

Ultimately, the Ninth Circuit's holding that Miller was entitled to seek none of this relief against any individual defendant was based on its policy view that the imposition of personal liability was unnecessary because "[n]o employer will allow supervisory or other personnel to violate Title VII when the employer is liable for the Title VII violation". (App. A-9) Whatever the merits of that view, *see infra* Section III, however, it is not the choice Congress has made. As this Court has frequently noted, there "simply is no basis" for a court "to substitute a judicial policy preference for the scheme adopted by Congress". *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 303 (1981); *see Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 487 (1989).

II. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE SPLIT IN THE CIRCUITS AS TO WHETHER THE "AGENT" OF AN EMPLOYER WHO ENGAGES IN DISCRIMINATORY CONDUCT CAN BE HELD PERSONALLY LIABLE UNDER TITLE VII AND THE ADEA.

A. The Ninth Circuit's Decision Conflicts With Decisions Of Other Circuits Holding Agents Of An Employer Liable Under Title VII And The ADEA.

The Ninth Circuit's decision conflicts with the decisions of the Courts of Appeals for the Second, Fourth, Fifth, Sixth and Eleventh Circuits, which have all held that an agent of an employer who engages in discrimination can be held personally liable under Title VII and the ADEA. The split in the Circuits gives employees in different states vastly different protection under the Federal employment discrimination laws and leaves supervisory employees with different liability rules depending on where the unlawful employment practice occurred. Unless this Court addresses the question, the enforcement of the employment discrimination laws, which Congress intended to be uniform throughout the nation, will remain a patchwork.

The Fourth Circuit has held that a supervisory employee can be held personally liable for his or her discriminatory conduct

under Title VII. In *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), *modified in part on other grounds*, 900 F.2d 27 (4th Cir. 1990), the court specifically rejected the Ninth Circuit's reading of Title VII, holding, "An individual qualifies as an 'employer' under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment." 879 F.2d at 104. The court held that a supervisor "may be held liable for any actionable sexual harassment in which he personally participated". *Id.* at 106.

Similarly, the Sixth Circuit has held that an agent of the employer who engages in discrimination can be held personally liable for that conduct under Title VII. In *Jones v. Continental Corp.*, 789 F.2d 1225, 1231 (6th Cir. 1986), the court held that "individuals may be held liable . . . as 'agents' of an employer under Title VII" and that a Title VII plaintiff could properly sue her supervisors in their individual capacities. *Jones* reflects the court's reasoning in *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360, 362 (6th Cir. 1982), which stated in dictum:

> an agent of an employer who may be sued as an employer in Title VII suits has been construed to be a supervisory or managerial employee to whom employment decisions have been delegated by the employer. For example, the president of a college who acts as the agent of the board of trustees may be sued as an employer in an employment discrimination suit. *Goodman v. Board of Trustees*, 498 F. Supp. 1329, 1332 (N.D. Ill. 1980). Similarly, the superintendent of a school district, as agent of the district, *Kelly v. Richland School District*, 463 F. Supp. 216 (D.S.C. 1978), and the manager of an Employment Security Commission office as the agent of the state commission, *Harbert v. Rapp*, 419 F. Supp. 6 (W.D. Okla. 1976) may be sued as employers under Title VII.

Cf. Kauffman v. Allied Signal, Inc., 970 F.2d 178, 185 (6th Cir.) ("An individual qualifies as an 'employer' under Title VII if he

or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment") (dictum; internal quotations omitted), *cert. denied*, 113 S. Ct. 831 (1992).

The Fifth Circuit has also held that supervisory employees can be held personally liable under Title VII "'if [they] participated in the decision-making process that forms the basis of the discrimination'". *Hamilton v. Rodgers*, 791 F.2d 439, 443 (5th Cir. 1986) (quoting *Jones v. Metropolitan Denver Sewage Disposal District*, 537 F. Supp. 966, 970 (D. Colo. 1982)). In *Hamilton*, the court affirmed an award of back pay against supervisory employees in the Houston Fire Department and held that individual supervisors could be personally liable for conduct that violated Title VII. The court noted that "[t]o hold otherwise would encourage supervisory personnel to believe that they may violate Title VII with impunity". 791 F.2d at 443.[9]

Moreover, both the Second and Eleventh Circuits, although not specifically addressing the issue of whether individuals can be held liable under Title VII and the ADEA, have held that agents of the employer who exercise some control over hiring, firing or the conditions of employment can be held liable for conduct that violates Title VII. Those circuits have expressly rejected the Ninth Circuit's reasoning that the only purpose of the definition of employer to include agents of the employer was to incorporate *respondeat superior* liability into the statutes. In *Spirt v. Teachers Ins. & Annuity Assocs.*, 691 F.2d 1054 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983), *modified*, 735 F.2d 23 (2d Cir.), *cert. denied*, 469 U.S. 881 (1984), the

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[9] In *Harvey v. Blake*, 913 F.2d 226 (5th Cir. 1990), the Fifth Circuit limited *Hamilton* and held that "public officials may be liable for backpay under Title VII in their official capacity only". *Id.* at 228 n.2. *Harvey* does not disturb the court's central holding in *Hamilton* that the agent of an employer can be held liable under Title VII, and does not address the question whether the agent of a private employer can be held liable for backpay. Indeed, *Harvey* reaffirmed *Hamilton's* interpretation of Title VII, noting that "immediate supervisors are Employers when delegated the employer's traditional rights, such as hiring and firing." *Id.* at 227.

Second Circuit held that a third party insurer who administered a pension plan for a university could be liable as the agent of the university for conduct that violated Title VII. Similarly, in *Williams v. City of Montgomery*, 742 F.2d 586 (11th Cir. 1984), the Eleventh Circuit held that the Montgomery City-County Personnel Board when engaged in discrimination on the grounds of race was liable as the "agent" of an employer under Title VII. The court reasoned: "'Where the employer has delegated control of some of the employer's traditional rights, such as hiring or firing, to a third party, the third party has been found to be an "employer" by virtue of the agency relationship'". *Id.* at 589 (quoting Barbara Schlei & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 1002 (2d ed. 1983)).

The Ninth Circuit's holding also conflicts with district court decisions in the First,[10] Second,[11] Third,[12] Fourth,[13] Sixth,[14]

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[10] *See Lamirande v. Resolution Trust Co.*, C.A. No. 93-363-SD, 1993 U.S. Dist. Lexis 14602 (D.N.H. Oct. 7, 1993).

[11] *See Bridges v. Eastman Kodak Co.*, 800 F. Supp. 1172 (S.D.N.Y. 1992); *Archer v. Globe Motorists Supply Co.*, No. 92 Civ. 9511 (VLB), 1993 U.S. Dist. LEXIS 7162 (S.D.N.Y. May 25, 1993); *Vesey v. Grover*, 780 F. Supp. 991, 993 (W.D.N.Y. 1992); *Wanamaker v. Columbian Rope Co.*, 740 F. Supp. 127, 135 (N.D.N.Y. 1990); *Bostick v. Rappleyou*, 629 F. Supp. 1328, 1334 (N.D.N.Y. 1985) (Miner, J.); *Obradovich v. Federal Reserve Bank of New York*, 569 F. Supp. 785 (S.D.N.Y. 1983).

[12] *See Duva v. Bridgeport Textron*, 632 F. Supp. 880, 882 (E.D. Pa. 1985); *McAdoo v. Toll*, 591 F. Supp. 1399, 1405-06 (D. Md. 1984); *Pao v. Holy Redeemer Hospital*, 547 F. Supp. 484, 494-95 & n.5 (E.D. Pa. 1982) (Pollak, J.).

[13] *See Magnuson v. Peak Technical Services, Inc.*, 808 F. Supp. 500, 510-11 (E.D. Va. 1992); *House v. Cannon Mills Co.*, 713 F. Supp. 159, 161 (M.D.N.C. 1988); *Coffin v. South Carolina Dep't of Social Servs.*, 562 F. Supp. 579, 587-58 (D.S.C. 1983); *Kelly v. Richland School Dist.*, 463 F. Supp. 216 (D.S.C. 1978).

[14] *See Kolb v. Ohio*, 721 F. Supp. 885 (N.D. Ohio 1989); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 466 (E.D. Mich. 1977); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 158 (S.D. Oh. 1976).

Seventh,[15] Eighth,[16] Tenth,[17] Eleventh[18] and District of Columbia Circuits.[19] Since the Ninth Circuit's decision, district courts in two different circuits have expressly rejected it. *See Lamirande v. Resolution Trust Co.*, No. 93-363-SD, 1993 U.S. Dist. LEXIS 14602 (D.N.H. Oct. 7, 1993); *Strzelecki*, 824 F. Supp. at 829 n.3. Scholarly commentators have also agreed that supervisory or managerial employees can be held liable for race, sex or age discrimination under Title VII and the ADEA.[20]

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[15] *See Vakharia v. Swedish Covenant Hospital*, No. 90 C 6548, 1993 U.S. Dist. LEXIS 8074 (N.D. Ill. June 8, 1993); *Strzelecki v. Schwarz Paper Co.*, 824 F. Supp. 821, 829 n.3 (N.D. Ill. 1993); *Hrabak v. Marquip, Inc.*, 798 F. Supp. 550, 553 (W.D. Wis. 1992); *Suarez v. Illinois Valley Community College*, 688 F. Supp. 376, 379-80 (N.D. Ill. 1988). *But see Pelech v. Klaff-Joss, L.P.*, No. 92C 7127, 1993 U.S. Dist. LEXIS 8851 (N.D. Ill. June 23, 1993); *Weiss v. Coca-Cola Bottling Co.*, 772 F. Supp. 407, 410-11 (N.D. Ill. 1991); *Pommier v. James L. Edelstein Enterp.*, 816 F. Supp. 476 (N.D. Ill. 1993).

[16] *See Burrell v. Truman Medical Center, Inc.*, 721 F. Supp. 230, 232 (W.D. Mo. 1989).

[17] *See Jones v. Metropolitan Denver Sewage Disposal Dist. No. 1*, 537 F. Supp. 966, 970 (D. Colo. 1982); *Sandoval v. Pagano*, 763 F. Supp. 1087, 1091 (D. Colo. 1991); *Tafoya v. Adams*, 612 F. Supp. 1097, 1105 (D. Colo. 1985), *aff'd on other grounds*, 816 F.2d 555 (10th Cir.), *cert. denied*, 484 U.S. 851 (1987); *Hendrix v. Fleming Companies*, 650 F. Supp. 301, 302 (W.D. Ok. 1986); *Mason v. Twenty-Sixth Judicial Dist. of Kansas*, 670 F. Supp. 1528, 1532 (D. Kan. 1987); *Barger v. State of Kansas*, 630 F. Supp. 88, 89-91 (D. Kan. 1985).

[18] *See Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1527 (M.D. Fla. 1991).

[19] *See Thompson v. Intern. Ass'n of Machinists*, 580 F. Supp. 662, 668-69 (D.D.C. 1984).

[20] *See* II Charles A. Sullivan, Michael J. Zimmer and Richard F. Richards, EMPLOYMENT DISCRIMINATION § 14.5 at 43 (2d ed. 1988) ("A better approach to this problem would be to hold an official, officer, or employee personally liable if the person was 'responsible' for the discriminatory act"); Mack A. Player, EMPLOYMENT DISCRIMINATION LAW § 5.67, at 447-48 (1988) ("The supervisor acting as an 'agent' will be deemed to be an 'employer' and if joined in the suit will be severally liable for monetary relief granted to the plaintiff"); 1 Arthur Larson & Lex K. Larson, EMPLOYMENT DISCRIMINATION: SEX § 5.34, at 2-62 (1993) ("Title VII provides that an employer's agent can be individually liable for his discriminatory acts by specifically including agents in the definition of employer. This means, for example, that when the formal relationship is with a corporation, the statute also imposes liability on the

Finally, the Ninth Circuit's decision is inconsistent with the well-established body of law concerning the specificity with which one must identify an individual in charges filed with the EEOC to be able to name that individual in a subsequent Title VII action.[21] Many courts including the Ninth Circuit—have held that under certain circumstances, supervisors, managers and other agents not named in charges filed with the EEOC may properly be named as defendants in a subsequent Title VII action. *E.g., Sosa v. Hiraoka*, 920 F.2d 1451, 1459-60 (9th Cir. 1990) (because members of board of trustees "'should have anticipated' that the claimant would name those defendants in a Title VII suit, the court has jurisdiction over those defendants even though they were not named in the EEOC charge"; "[t]he [college] administrators involved in the censure [of plaintiff] were also involved in the other allegations made in the EEOC charge, and so they are subject to suit in federal court"); *Bernstein v. Aetna Life & Casualty*, 843 F.2d 359, 362 (9th Cir. 1988) (reversing district court's grant of summary judgment on Title VII complaint to plaintiff's immediate supervisor, who was not named in EEOC charge); *Greenwood v. Ross*, 778 F.2d 448, 451 (8th Cir. 1985) (reversing district court's dismissal of Title VII complaint as to university chancellor, athletic director, and members of the board of trustees named in their individual capacities, who were not named in EEOC charges); *Chung v. Pomona Valley Community Hosp.*, 667 F.2d 788, 792 (9th Cir. 1982) (supervisors individually named as defendants in Title VII action should not have been dismissed because plaintiff's EEOC charge "supplied

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particular hiring officer or other person who actually made and carried out the discriminatory employment action"); Barbara Schlei & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 1002 (2d ed. 1983) ("Supervisory employees have been found to be 'agents' of the employer in carrying out their usual supervisory duties").

[21] Because the lower courts began developing that caselaw prior to this Court's decision in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), several of the decisions preceding *Zipes* viewed the filing of EEOC charges as jurisdictional. Nevertheless, the reasoning of those courts remains valid, and has been incorporated into post-*Zipes* decisions, which reflect the non-jurisdictional nature of EEOC charges.

an adequate basis for his Title VII claims against the [supervisors]"); *Eggleston v. Chicago Journeymen Plumbers' Local No. 130*, 657 F.2d 890, 907 (7th Cir. 1981) (reversing dismissal of Title VII complaint against agent of employer not named in EEOC charge); *Romero v. Union Pac. R.R.*, 615 F.2d 1303, 1311 (10th Cir. 1980) (remanding Title VII action to district court to determine whether court had jurisdiction over individual defendants not named in EEOC charges); *Sandon v. Travelers Mortgage Serv., Inc.*, 752 F. Supp. 1240, 1249-51 (D.N.J. 1991); *Acampora v. Boise Cascade Corp.*, 635 F. Supp. 66, 71 (D.N.J. 1986); *Brewster v. Shockley*, 554 F. Supp. 365, 369 (W. D. Va. 1983). That body of law would be wholly meaningless if, as the Ninth Circuit held, agents of an employer cannot be sued under Title VII.

B. The Ninth Circuit's Decision Conflicts With Decisions Of This Court And Other Courts Construing The Analogous Provision Of The Fair Labor Standards Act.

The Ninth Circuit's decision conflicts with the decisions of this Court and numerous other courts interpreting the analogous provision under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* Much like Title VII and the ADEA, the FLSA defines "employer" to "include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee". 29 U.S.C. § 203(d). *See House v. Cannon Mills Co.*, 713 F. Supp. 159, 160 & n.1 (M.D.N.C. 1988) (noting similarity in FLSA and ADEA definitions of "employer").[22]

This Court in *Falk v. Brennan*, 414 U.S. 190, 195 (1973), held that an "employer" who can be held personally liable under the FLSA includes a person with "substantial control of the terms and conditions of the work" of employees and not just the actual employer. Following *Falk*, the Courts of Appeals have uniformly held that individuals, including supervisory employees, who

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[22] In addition, the ADEA states that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided" in the FLSA. 29 U.S.C. § 626(b); *see Lorillard v. Pons*, 434 U.S. 575 (1978).

violate the FLSA can be held personally liable for their violations of the FLSA. *See, e.g., Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 966 (6th Cir. 1991) (chief corporate officer is an employer under the FLSA and is "chargeable with personal liability for failure to comply with the FLSA"); *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 971-72 (5th Cir. 1984) (affirming injunction against president of corporation restraining him from violating the FLSA), *cert. denied*, 471 U.S. 1124 (1985); *Lee v. Coahoma County*, 937 F.2d 220, 226 (5th Cir. 1991) ("The term employer includes individuals with managerial responsibilities [and] [i]f an individual with managerial responsibilities is deemed an employer under the FLSA, the individual may be jointly and severally liable for damages resulting from the failure to comply with the FLSA"); *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983) ("[t]he overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages"); *see also Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987) ("the word 'employer' is defined broadly enough in the Fair Labor Standards Act (of which the Equal Pay Act is an amendment) to permit naming another employee rather than the employer as defendant provided the defendant had supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation") *Patel v. Wargo*, 803 F.2d 632, 637-38 (11th Cir. 1986) (quoting with approval *Donovan v. Agnew*).

There is no meaningful difference between the definition of "employer" under the FLSA and the definition under Title VII and the ADEA. Therefore, this Court's decision in *Falk v. Brennan* should control the interpretation of Title VII and the ADEA.

III. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE PERSONAL LIABILITY OF AGENTS OF AN EMPLOYER UNDER TITLE VII AND THE ADEA IS AN IMPORTANT QUESTION OF FEDERAL LAW.

In discussing the liability of labor organizations and employment agencies, as well as employers and their agents under Title VII and the ADEA, the circuit courts have stressed the crucial deterrent and remedial objectives served by imposing liability for discrimination on the entity actually engaged in that discrimination.[23] This case presents the important federal question, which has not been but should be decided by this Court, whether there is a special exemption for agents of the employer, alone among the persons defined as subject to the coverage of Title VII and the ADEA, from personal liability under those statutes.

This issue should be decided by this Court. Title VII and the ADEA are two of the most frequently and widely enforced statutes in the nation. As the wealth of cases cited in Section II demonstrates, the question whether an agent of the employer can be held liable under Title VII or the ADEA has arisen and will continue to arise in numerous different contexts. Indeed, in addition to those cases, managers, supervisors and other agents of employers have, without comment, been held personally liable under Title VII and the ADEA in scores of cases. *See, e.g., New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 56, 58, 71 (1980) (affirming award of attorney's fees under Title VII against

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[23] *See, e.g., Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1381 (5th Cir. 1974) ("it would be difficult to fasten liability on one party to the labor contract which was a substantial cause of the discriminatory employment practices and grant total immunity from such liability to the other party"); *E.E.O.C. v. Enterprise Ass'n Steamfitters Local No. 638*, 542 F.2d 579, 585 (2d Cir. 1976) ("Since in many instances it may well be that union, rather than employer, discrimination is the prime factor resulting in the evil proscribed under Title VII, any broad rule that unions are exempt from the equitable backpay award could well 'frustrate the central statutory purposes' of the Act"), *cert. denied*, 430 U.S. 911 (1977).

nightclub and club manager); *Biggins v. Hazen Paper Co.*, 953 F.2d 1405, 1408, 1428 (1st Cir. 1992) (upholding award of damages and attorney's fees under the ADEA against the employing company and the two individuals who owned and operated it), *vacated on other grounds*, 113 S. Ct. 1701 (1993); *Gutzwiller v. Fenick*, 860 F.2d 1317, 1319, 1324, 1332-33 (6th Cir. 1988) (imposing Title VII liability, including back pay, on university and individuals who had discriminated against plaintiff); *Price v. Marshall Erdman & Assocs., Inc.*, 966 F.2d 320, 324 (7th Cir. 1992) (affirming award of back pay and attorneys' fees against supervisor and employer under ADEA and remanding for consideration of front pay).

The Ninth Circuit's decision will have a severe practical impact both on the deterrence of unlawful discriminatory conduct and on the availability of relief for discrimination when it occurs. This Court has recognized that the imposition of liability is "'the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975) (quoting *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)). The Ninth Circuit's decision, however, would leave immune from that "spur or catalyst" the very individuals who should be deterred from misconduct, placing liability solely on the employer and leaving it to the employer alone to see that discrimination in the workplace is adequately punished. The goal of deterring discrimination "is undermined when people who make discriminatory decisions do not have to pay for them". *Strzelecki*, 824 F. Supp. at 829 n.3; *see also Dague v. Riverdale Athletic Ass'n*, 99 F.R.D. 325, 327 (N.D. Ga. 1983) ("it is inconceivable that Congress could have intended to exclude from liability the very persons who have engaged in the employment practices which are the subject of the action"). As the Fifth Circuit has stated, to exempt the agent of the employer from liability "would encourage supervisory personnel to believe that they may violate Title VII with impunity". *Hamilton v. Rodgers*, 791 F.2d at 443.

Moreover, the Ninth Circuit's decision would leave large categories of victims of discrimination without redress in the numerous cases—including this one—in which the employer files for bankruptcy, becomes insolvent, dissolves, or otherwise cannot be reached by judicial process. *See* 1 Sullivan, Zimmer & Richards, EMPLOYMENT DISCRIMINATION § 1.4, at 11.

This Court has emphasized that "one of the central purposes of Title VII is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.'" *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (quoting *Albemarle Paper*, 422 U.S. at 418). Under the Ninth Circuit's holding, Miller and all employees similarly situated to her will have no remedy at all for conduct that violates Title VII or the ADEA.

The Ninth Circuit's decision would also frustrate full and effective relief in those cases in which an injunction restraining a defendant from engaging in discriminatory conduct or an award of nominal damages is appropriate against the individual supervisor but cannot be obtained in a suit against the employer.

This issue presents a particular concern in cases of sexual or racial harassment or hostile work environment. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Court held that a claim that the sexual harassment by a supervisor created a hostile work environment stated a claim under Title VII, *id.* at 66, but that Title VII did not "impose absolute liability on employers for the acts of their supervisors". *Id.* at 73. *See also City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 718 n.33 (1978) ("We do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to 'any agent' of a covered employer"). Under the Ninth Circuit's holding, however, there would be an entire class of cases—those involving harassment or a hostile work environment but where the employer is not liable—in which the conduct violates Title VII but for which there would be no remedy under Federal law.

CONCLUSION

For the reasons stated, petitioner Phyllis Miller requests this Court to issue a writ of *certiorari* to review the decision of the Court of Appeals for the Ninth Circuit.

October 26, 1993

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APRIL 19, 1993

No. 90-16286

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

April 19, 1993

PHYLLIS MILLER,
Plaintiff-Appellant,

v.

MAXWELL'S INTERNATIONAL INC., DBA MAXWELL'S PLUM, DEBTOR IN POSSESSION; CARLO GALAZZO, GEN. MGT. DINO LA ROSA; DON BOHN; DON SCHUPAK, ET AL.,
Defendants-Appellees.

Phyllis Miller, pro se.

Robert D. Links, Dobbs, Berger, Molinari, Vannelli, Nadel & Links, San Francisco, CA, for the defendants-appellees.

Samuel A. Marcosson, Atty., E.E.O.C., Washington, D.C., for the amicus.

Before FLETCHER, WIGGINS, and KOZINSKI, Circuit Judges.

Appeal from the United States District Court for the Northern District of California.

WIGGINS, Circuit Judge:

Plaintiff/Appellant Phyllis Miller, proceeding pro se, filed sex and age discrimination claims in the district court under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988), the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (1988), and the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d) (incorporated into and

enforced through the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219 (1988)). She also asserted claims for retaliation and emotional distress. Miller appeals from the district court's dismissal of her claims as untimely (barred by statutes of limitations and laches) or for failure to state a claim.

I. Facts.

Miller is pursuing sex and age discrimination claims against six defendants in their individual capacities: Donald Schupak, Dino La Rosa, Carlo Galazzo, Bui Duc Huy, Don Bohn, and Robert Stewart. Donald Schupak was CEO of Maxwell's International, the corporate owner of Maxwell's Plum restaurant, Miller's employer. La Rosa and Galazzo were both general managers of the restaurant; La Rosa was manager from Miller's initial hiring in 1982 until 1985, and Galazzo was manager from 1985 until Miller's third and final termination in 1986. Huy, Bohn, and Stewart were all lower level employees of Maxwell's Plum.

Miller alleges that when she was hired she was told that she would be promoted, but was not because of her sex and age, and that she worked as a manager of the "Terrace Garden" room but was not paid manager's wages. Miller also alleges that La Rosa reduced her hours and subjected her to a hostile work environment because of her sex and age and retaliated against her for complaining of discrimination to La Rosa. Miller further alleges that in retaliation for her having complained to her union about these actions, La Rosa fired her in July, 1984.

After her firing, Miller filed charges with the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations board (NLRB). NLRB proceedings resulted in Miller's reinstatement as a Maxwell's Plum employee. Thereafter, Miller alleges that Galazzo harassed her and denied her a full time schedule in retaliation for her previous EEOC and NLRB charges. She filed a second NLRB charge on October 30, 1985. Miller alleges that Huy and Bohn gave her notice that she had been fired a second time on November 8, 1985, and that Stewart and Galazzo issued a formal termination notice the next day. Miller also alleges that Galazzo, Bohn, and Stewart refused to write her

letters of recommendation in retaliation for her earlier charges and because of sex and age discrimination. These allegations led to a second EEOC charge filed on November 13, 1985.

Sometime in March, 1986, Miller alleges that she was reinstated but then terminated for the third and final time because of retaliatory motives and sex and age discrimination. Miller also alleges that a lawsuit filed by Galazzo against her in March, 1986, constituted malicious prosecution, and she alleges that Galazzo and Schupak denied her unemployment benefits sometime in the Spring of 1986.

After receiving her right-to-sue letter from the EEOC, Miller timely filed an action in the district court on April 24, 1987. Proceeding pro se, Miller was given four opportunities to allege facts that stated a claim against the defendants. After her third amended complaint, the district court finally dismissed Miller's claims on May 18, 1990. The district court then erroneously granted Miller an extension of time to file a motion to alter or amend the judgment. Miller filed her motion on June 27, 1990, and the district court denied it on August 14, 1990.

II. Standard Of Review.

The district court dismissed Miller's claims as untimely (barred by statutes of limitations and laches) or for failure to state a claim. In addition, Miller's appeal raises a jurisdictional issue. These are all questions of law or at least mixed questions of law and fact and are reviewed de novo. *See, e.g., Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989) (both failure to state a claim and subject matter jurisdiction are questions of law and are reviewed de novo), *cert. denied*, 496 U.S. 937, 110 S.Ct. 3217, 110 L.Ed. 2d 664 (1990); *In re Hawaii Federal Asbestos Cases*, 871 F.2d 891, 893 (9th Cir. 1989) (statute of limitation reviewed de novo).

III. Jurisdiction.

The first issue we must address is the jurisdictional question raised by Miller's failure to file a timely notice of appeal or motion to extend the appellate filing deadline. *See* Fed. R. App. P. 4(a)(1), (5). The district court entered its judgment on May 23,

1990. Thus, Miller's notice of appeal should have been filed by June 22, 1990, thirty days after the entry of judgment, or a motion to extend the appellate filing deadline should have been filed by July 23, 1990, within thirty days of the expiration of the appellate filing deadline. Miller did not file her notice of appeal until August 30, 1990.

Instead of filing a notice of appeal, Miller filed a motion for an extension of time to request alteration or amendment of the judgment on June 5, 1990. *See* Fed. R. Civ. P. 59(e). Although the district court lacked the authority to do so, *see* Fed. R. Civ. P. 6(b), it issued an order on June 6, 1990, granting the motion. Miller relied on this erroneous ruling and waited until after the resolution of her Rule 59(e) motion before bringing her appeal. If the district court had not granted Miller's motion on June 5, 1990, she still would have had ample time to file her appeal by the June 22, 1990, deadline.

If the notice of appeal is the only deadline Miller has missed, it is clear that Miller is entitled to equitable relief under the "unique circumstances" doctrine recognized in *Barry v. Bowen*, 825 F.2d 1324, 1329 (9th Cir. 1987). Even the defendants concede that *Barry* allows equitable tolling of the appellate filing deadline if (1) a district court took action that gave the parties good reason to believe that the appellate filing deadline was extended and (2) the time period for filing an appeal had not yet lapsed at the time of the district court's action. The district court's grant of Miller's motion for an extension of time on June 6, 1990, meets both of the *Barry* criteria for application of the unique circumstances doctrine.

However, the defendants argue that the appellate filing deadline is not the only deadline that Miller missed. When the district court erroneously granted Miller's motion for an extension of time on June 6, 1990, the applicable deadline was extended twenty days, or to June 26, 1990. Miller's Rule 59(e) motion was not filed until June 27, 1990, twenty-one days after the court granted the extension. Thus, the defendants argue that Miller's Rule 59(e) motion was one day late and that this second missed deadline is not excused under the *Barry* doctrine.

However, the defendants overlook the fact that the timeliness of a Rule 59(e) motion hinges on the date of service by the movant, not the date of filing with the district court. *See* Fed. R. Civ. P. 59(e). Service by mail is complete at the time of mailing. Fed. R. Civ. P. 5(b). Miller mailed her Rule 59(e) motion to the court and to opposing counsel on June 25, 1990, which was before the deadline of the erroneously granted extension. Miller's Rule 59(e) motion was therefore timely under the limits set by the *Barry* doctrine, and we may exercise jurisdiction.

IV. The Timing of Miller's Claims.

A. Willful Conduct and the Statute of Limitations.

The district court dismissed Miller's ADEA and EPA claims as time-barred because the court concluded that Miller did not sufficiently allege willful conduct, which would have entitled her to a more generous three-year statute of limitations. *See* 29 U.S.C. § 255(a) (1988) (three-year statute of limitations for willful violations of the EPA); 29 U.S.C. § 626(e) (1988) (incorporating the statutes of limitations under § 255 into the ADEA). We conclude that Miller sufficiently alleged willful violations of the ADEA but not of the EPA. Miller alleged that La Rosa verbally harassed her in an intentional effort to torment her and that La Rosa and Galazzo willfully belittled her because of her age in front of customers and other employees. Moreover, Miller alleged a continuing pattern of ADEA violations that took place after she had filed her EEOC charges and the defendants knew their conduct was being challenged under the law. These allegations are enough, if proven, to establish a "reckless disregard" for the law. *See Brock v. Richland Shoe Co.*, 799 F.2d 80, 83 (3d Cir. 1986) quoting *TWA v. Thurston*, 469 U.S. 111, 128, 105 S. Ct. 613, 625, 83 L.Ed. 2d 523 (1985)), *aff'd, McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 108 S. Ct. 1677, 100 L.Ed. 2d 115 (1988). However, none of the alleged EPA violations was willful, and none of them took place after the EEOC charges were filed.

B. Laches.

The district court barred the remainder of Miller's ADEA claims under the equitable defense of laches. This was error

because the doctrine of laches is inapplicable when Congress has provided a statute of limitations to govern the action. *See, e.g., International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 926 (9th Cir. 1975). Because Congress provided a statute of limitations to govern ADEA actions, *see* 19 U.S.C. § 255 (1988), Miller's ADEA claims cannot be barred by laches.

C. Emotional Distress Claims.

Miller's claims for emotional distress are barred by the California statute of limitations, which requires an action for emotional distress to be brought within one year of the time the plaintiff knew of the facts essential to the cause of action. *See* Cal. Civ. Proc. Code § 340(3) (West 1982); *Holland v. Bank of Am.*, 673 F. Supp. 1511, 1515 (S.D. Cal. 1987) (employee's emotional distress claim barred under section 340(3)'s one-year statute of limitations); *DeRose v. Carswell*, 196 Cal. App. 3d 1011, 1015-18, 242 Cal. Rptr. 368, 370-71 (1987). The most recent alleged wrongful act by the defendants - the alleged malicious prosecution - took place in March, 1986. Because this action was filed on April 24, 1987, there is no conduct that Miller has alleged that falls within the one-year statute of limitations.

Miller also alleges that Galazzo denied her unemployment benefits in early 1986, but does not give a specific date on which this denial occurred. However, even if this conduct occurred after April 24, 1986, it is insufficient as a matter of law to state a claim for emotional distress. A denial of unemployment benefits is a common business decision and is simply not conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Restatement (Second) of Torts* § 46 comment d (1965). This is not a close issue; Miller's action for emotional distress is barred by the statute of limitations.[1]

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[1] In the alternative, the district court and the defendants provide other meritorious arguments that support the dismissal of Miller's emotional distress claims. We do not address these additional arguments because it is clear that the emotional distress claims are barred by the statute of limitations.

V. Individual Liability Under Title VII and the ADEA.

Finally, the defendants argue that they have no personal liability under Title VII and the ADEA and that Miller received all of the relief to which she was entitled when she settled her claims with her corporate employer, Maxwell's International. We agree.

In ruling on this issue, the district court noted that "it is unlikely that Congress intended to impose personal liability on employees," but determined that the text of the statute does not necessarily preclude such individual liability and refused to dismiss Miller's claim on this basis without more definite guidance from this court. The liability schemes under Title VII and the ADEA are essentially the same in aspects relevant to this issue; they both limit civil liability to the employer. *See* 42 U.S.C. § 2000e-5(g) (1988) (Title VII); 29 U.S.C. § 626(b) (1988) (ADEA) (allowing actions against an employer by incorporating the procedures under 29 U.S.C. § 216(b)). Because Congress assessed civil liability only against an employer under Title VII, this court has held that "individual defendants cannot be held liable for back pay." *Padway v. Palches,* 665 F.2d 965, 968 (9th Cir. 1982); *Seib v. Elko Motor Inn,* 648 F. Supp. 272, 274 (D. Nev. 1986); *Pree v. Stone & Webster Eng'g Corp.,* 607 F. Supp. 945, 950 (D. Nev. 1985).

Nevertheless, the interpretation of the statutes to bar individual liability merits discussion because it conflicts with the reasoning of some courts. The term "employer" under the Title VII and the ADEA liability schemes is defined to include any agent of the employer. 42 U.S.C. § 2000e(b); 29 U.S.C. §§ 630(b), 203(d). Thus, some courts have reasoned that supervisory personnel and other agents of the employer are themselves employers for purposes of liability. *See, e.g., Hamilton v. Rodgers,* 791 F.2d 439, 442-43 (5th Cir. 1986) (citing *Jones v. Metropolitan Denver Sewage Disposal Dist.,* 537 F. Supp. 966, 970 (D. Colo. 1982)), *limited by, Harvey v. Blake,* 913 F.2d 226, 227-28 (5th Cir. 1990); *cf. Barger v. State of Kan.,* 630 F. Supp. 88, 90-92 (D. Kan. 1985).

Although this statutory construction argument is not without merit, we are bound by *Padway*, which, in any event, announced the better rule. As the district court below noted, "[t]he obvious purpose of this [agent] provision was to incorporate respondeat superior liability into the statute." This conclusion is buttressed by the fact that many of the courts that purportedly have found individual liability under the statutes actually have held individuals liable only in their *official* capacities and not in their individual capacities. *See, e.g., Harvey v. Blake*, 913 F.2d at 227-28 & n.2; *Barger*, 630 F. Supp. at 91-92 (citing *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360, 362 (6th Cir. 1982), and other authority). Indeed, these courts have joined this circuit in protecting supervisory employees from liability in their individual capacities.

The statutory scheme itself indicates that Congress did not intend to impose individual liability on employees. Title VII limits liability to employers with fifteen or more employees, 42 U.S.C. § 2000e(b), and the ADEA limits liability to employers with twenty or more employees, 29 U.S.C. § 630(b), in part because Congress did not want to burden small entities with the costs associated with litigating discrimination claims. If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees.

Thus, this court's ruling in *Padway* that individual defendants cannot be held liable for damages under Title VII is good law, [2]

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[2] At the time Padway was decided, damages were not available under Title VII. Since that time, Congress enacted the Civil Rights Act of 1991, which permits compensatory and punitive damages for intentional discrimination. *See* 42 U.S.C. § 1981a (1992 Supp.). However, in drafting that section, Congress specifically limited the damages available depending upon the size of the respondent *employer*. *See id.* at § 1981a(b)(3)(A)-(D). Because we think that if Congress had envisioned individual liability under Title VII for compensatory or punitive damages, it would have included *individuals* in this litany of limitations and would have discontinued the exemption for small employers, we resist Judge Fletcher's urging specifically to limit *Padway* to back pay.

and, because of the similarities in the Title VII and ADEA statutory schemes, is applicable to suits under the ADEA. [3] Although one court has determined that this holding "would encourage supervisory personnel to believe that they may violate Title VII with impunity," *Hamilton*, 791 F.2d at 443, the court's reasoning is unsound. No employer will allow supervisory or other personnel to violate Title VII when the employer is liable for the Title VII violation. An employer that has incurred civil damages because one of its employees believes he can violate Title VII with impunity will quickly correct that employee's erroneous belief. This conclusion is supported by the Fifth Circuit's apparent agreement with us that the *Hamilton* holding is suspect. *See Harvey v. Blake*, 913 F.2d at 228 n.2. There is no reason to stretch the liability of individual employees beyond the respondeat superior principle intended by Congress. Under our interpretation of *Padway* and the Title VII and ADEA statutory

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[3] Judge Fletcher argues that we should refrain from extending the conclusion that individual defendants cannot be held liable for damages under Title VII to suits under the ADEA based on *House v. Cannon Mills Co.*, 713 F. Supp. 159, 160 (M.D.N.C. 1988). *House* distinguished between Title VII and the ADEA for two reasons: one, because of the difference in the scope of relief, i.e., at the time *House* was decided, liquidated damages were available for willful violations of the ADEA, *see* 29 U.S.C. § 626(b), but damages were not available under Title VII; and, two, because "the ADEA incorporates the remedies and procedures of the Fair Labor Standards Act ("FLSA") . . ." *House*, 713 F. Supp. at 160. We do not find the *House* distinction persuasive. First, we note that Congress has amended Title VII to allow for both compensatory and punitive damages, and has done so in such a way that indicates that individuals are not liable for those damages under Title VII. *See* note 2, *supra*. This reinforces our statement that "the liability schemes under Title VII and the ADEA are essentially the same in aspects relevant to this issue; they both limit civil liability to the employer." Second, we note that, although the ADEA incorporates *some* provisions of the FLSA, it does not specifically incorporate the provision that defines "employer." *See* 29 U.S.C. § 630(b). Although the *House* court correctly pointed out that the specific and selective incorporation of FLSA enforcement provisions into the ADEA evidences a Congressional intent to adopt existing interpretations of those provisions, we think logically that adoption must be limited to those provisions that specifically are incorporated. Accordingly, we find *House* unpersuasive for our purposes, and we resist Judge Fletcher's suggestion that we apply it in this case.

schemes, Miller's claims against the defendants in their individual capacities properly were dismissed for failure to state a claim.

VI. Conclusion.

For the reason set forth above, the district court's order is AFFIRMED, but in part on grounds different than those relied upon by the district court. The claims against defendants Bohn, Huy, Stewart, La Rosa, Schupak and Galazzo are dismissed for failure to state a claim.

FLETCHER, Circuit Judge, dissenting:

I respectfully dissent from Part V of the majority opinion that individuals (employees of the employer) cannot be individually liable under *either* Title VII or the ADEA.

In respect to Title VII, the majority relies on *Padway v. Palches,* 665 F.2d 965 (9th Cir. 1982), which held that an "employer," not an employee, may be liable for an award of back pay. *Id.* at 968. Part of the rationale in *Padway* was that the employer, not a mere employee (regardless of that employee's supervisory powers), should pay *back wages.* General or punitive damages were not available under Title VII because the statute limited remedies to back pay and injunctive relief. *Id.* Employees, however, can be sued in their official capacities, allowing a successful plaintiff to obtain injunctive relief. *See, e.g., Harvey v. Blake,* 913 F.2d 226, 227-28 (5th Cir. 1990); *Sparks v. Pilot Freight Carriers, Inc.,* 830 F.2d 1554, 1557-59 (11th Cir. 1987); *Canada v. Boyd Group, Inc.,* 809 F. Supp. 771, 779 & n.3 (D. Nev. 1992); *Weiss v. Coca-Cola Bottling Co.,* 772 F. Supp. 407, 410-11 (N.D. Ill. 1991).

I am concerned that the majority's overbroad language may unnecessarily cloud decisionmaking under the Civil Rights Act of 1991, which now permits compensatory and punitive damages for intentional discrimination. 42 U.S.C.A. § 1981a (1992 Supp.). This significant revision may permit suits against individuals for compensatory and punitive damages where the discrimination was intentional. *But see id.* at § 1981a(b)(3)(A)-(D) (establishing

compensatory damage sum limitations by categories determined by "respondent[s']" number of employees). What can be said, and all that should be said, is that under Title VII prior to its amendment, an employee could not be held individually liable for back pay.

As for individual employee liability under the ADEA, I do not believe Miller's claims can be dismissed on the basis that "[t]he liability schemes under Title VII and the ADEA are essentially the same in aspects relevant to this issue." Maj. Op. at 587. Notwithstanding the many similarities between the two statutory schemes, at the time of the enactment of the ADEA its "scope of relief [wa]s much broader" than that afforded by Title VII.[4] *See House v. Cannon Mills Co.*, 713 F. Supp. 159, 160 (M.D.N.C. 1988). The difference in the scope of relief, in the *House* court's view, foreclosed reliance on *Padway* in determining individual liability under the ADEA. *Id.*

Perhaps a more significant difference between the two statutory regimes is that "the ADEA incorporates the remedies and procedures of the Fair Labor Standards Act ("FSLA"), which differ from those under Title VII." *See id.* (citing, *inter alia*, *Lorillard v. Pons*, 434 U.S. 575, 582, 98 S. Ct. 866, 871, 55 L.Ed. 2d 40 (1978).) The Supreme Court in *Lorillard* noted that it was Congress' selectivity "in incorporating provisions and in modifying certain FLSA practices [that] strongly suggests that but for those changes Congress expressly made, *it intended to incorporate fully the remedies and procedures of the FLSA.*" *Lorillard*, 434 U.S. at 582, 98 S.Ct. at 871 (emphasis added). There is no question that an individual can be personally liable as an employer under the FLSA; adverse employment actions attributable to individuals as a consequence of their authority over employment decisions can lead to individual liability where those actions violate the FLSA. *House*, 713 F. Supp. at 160-61 (citing

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[4] 29 U.S.C. § 626(b) provides as a remedy "liquidated damages" "in cases of willful violations." As discussed above, the 1991 amendments to Title VII may or may not have brought Title VII's scope of relief nearer to that available under the ADEA. If they did not, as appears likely given the construction of the limitations categories, ADEA still affords more expansive relief possibilities.

cases). The same result should apply to actions brought under the ADEA.

In *House*, the key inquiry centered on whether the employer's agents "had authority and discretion over [p]laintiff's discharge for allegedly discriminatory reasons." *Id.* at 161; *see also Wanamaker v. Columbian Rope Co.*, 740 F. Supp. 127, 135 (N.D.N.Y. 1990) (individual liability claim under ADEA possible where plaintiff contended that individual defendants "'participated in the decision making process that forms the basis of the discrimination'"). According to the court in *House*, "the clear import of the statutory language [in the ADEA], including the incorporation of the FLSA provisions and their accompanying case law, is imposition of personal liability on all 'employers,'" including supervisors. *House*, 713 F. Supp. at 161-62.

We should not dismiss *House* as simply a district court decision from another circuit with little persuasive force in our circuit. It is a thorough and well-reasoned opinion. Judge Posner, in *Shager v. Upjohn Co.*, 913 F.2d 398, 404 (7th Cir. 1990), has cited it with approval.[5] I conclude Miller should not be precluded from bringing an ADEA claim against those supervisors who took part in the termination decisions; those supervisors can be held liable, in their individual capacities, if their actions violated the ADEA. I would reverse.

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[5] The point that Posner makes is that although both Title VII and the ADEA define "employer" to include "agent of employer," there are limits to the imposition of employer liability under respondeat superior. Outrageous conduct by one employee to another unknown to the employer should not automatically be ascribed to the employer. *Shager*, 913 F.2d at 404.

APPENDIX B

ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAY 18, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PHYLLIS MILLER,	§	
Plaintiff,	§	
v.	§	No. C-87-1906-VRW
DINO LA ROSA, et al.,	§	
Defendants.	§	

ORDER

Plaintiff Phyllis Miller, proceeding *in propria persona*, brings this action for employment discrimination against various individual managerial employees of now bankrupt Maxwell's International, owner of Maxwell's Plum, a restaurant in which she was formerly employed. She asserts claims for sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), for age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the "ADEA"), for violation of the Equal Pay Act, 29 U.S.C. § 206(d) (the "EPA"), for retaliation, and for intentional infliction of emotional distress.

Defendants to the action are Dino La Rosa, general manager of the restaurant until 1985, Carlo Galazzo, general manager after 1985, Don Bohn, comptroller and also later assistant general manager, Bui Duc Huy, dining room director, Robert Stewart, dining room director, and Donald Schupak, chief executive officer of Maxwell's International. Plaintiff previously settled her claims against Maxwell's International, and the bankruptcy court in which Maxwell's International is a debtor approved the settlement October 17, 1988.[1]

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[1] As Judge Schwarzer found in his January 17, 1990, order, that plaintiff settled her claims against Maxwell's International does not provide a basis for dismissal of these claims against defendants here, who are agents of Maxwell's International. A plaintiff's settlement with a principal generally operates as a settlement with its agent as well. But this holds only if there are no circumstances indicating that the plaintiff intended a contrary result. *Transpac*

Judge William W Schwarzer dismissed plaintiff's first amended complaint on July 26, 1989, and her second amended complaint on January 17, 1990. In his January 17 order, Judge Schwarzer provided plaintiff with substantial guidance regarding the causes of action she was attempting to assert, and her third complaint reflects that plaintiff made every attempt to comply with the court's instructions.

In February 1990, the action was reassigned to the undersigned. Defendants now move to dismiss plaintiff's third amended complaint for failure to state a claim upon which relief can be granted. Defendants contend principally that (1) plaintiff failed to name the individual defendants as respondents in any of her EEOC charges prior to filing suit; (2) plaintiff's claims are barred by the applicable statutes of limitations; (3) plaintiff's claims are barred by laches; and (4) plaintiff's latest pleading does not contain the necessary specificity or charging allegations required by the court's previous orders.

Plaintiff moves the court to appoint counsel to represent her.

I. Plaintiff's Factual Allegations.

Plaintiff alleges that she was employed by Maxwell's Plum restaurant starting in August 1982. La Rosa, then General Manager, hired her as a hostess and promised that she would be promoted when a higher position became available. In Spring and Summer 1983, plaintiff managed the "Terrace Garden" breakfast room, although she was only paid hostess wages for her work. In Fall 1983, plaintiff began to complain to La Rosa and Galazzo that she believed she was being discriminated against, but defendants took no action.

Construction Co. v. Clark & Groff, Eng. Co., 466 F.2d 823, 829 (9th Cir. 1972). Here, plaintiff clearly did not intend to release the individual defendants when she settled with Maxwell's International. Rather, at the hearing in which the bankruptcy judge approved her settlement with Maxwell's, plaintiff repeatedly sought assurances from the judge that she would be able to continue this action against the individual defendants, and the bankruptcy court's order leaves open the possibility of suit against the individual defendants. (*See* Jan. 12, 1989 Links Dec. Exs. A, B.)

Plaintiff alleges that in January 1984, La Rosa discriminatorily reduced her hours. Upon plaintiff's request, the Hotel and Restaurant Employees and Bartenders Union protested this discriminatory action. In Spring and Summer 1984, Galazzo and La Rosa retaliated by replacing her as hostess with two younger employees, reducing her hours, refusing to promote her to a front-of-the-house management position or to banquet director trainee, denying culinary training to plaintiff that had been promised, writing false letters about plaintiff's job performance, and otherwise harassing her. She alleges that La Rosa and Galazzo made comments to her on several occasions that she was "too old" or would never be promoted because she was a woman. She alleges that she filled in as dining room director several times a week but was not paid managerial wages for her work.

Sometime in Summer 1984, plaintiff's union again intervened on her behalf. In July 1984, La Rosa terminated plaintiff because of her age and in retaliation for her request for Union intervention. Plaintiff's union filed a grievance on her behalf, she filed a charge with the Equal Employment Opportunity Commission ("EEOC") in October 1984, and she filed a charge with the National Labor Relations Board ("NLRB") in November 1984. In March 1985, at an EEOC hearing, La Rosa and Huy gave false testimony regarding plaintiff. Plaintiff was reinstated and granted backpay through the union arbitration proceedings sometime after July 1985.

Defendants refused to honor the arbitration agreement by delaying plaintiff's return to work, and then refusing to give her a full working schedule. In October 1985, Galazzo threatened plaintiff that she would have a "hard time" if she returned to work, which she did on October 14, 1985. On October 30, 1985, plaintiff filed a second NLRB charge against defendants over the denial of a full working schedule. Immediately upon receiving this charge, on November 8, 1985, Huy and Bohn gave plaintiff written and verbal notice that she was terminated again, and on the following day Stewart and Galazzo issued a formal termination notice to plaintiff. Galazzo, Huy, and Bohn refused

to write plaintiff letters of recommendation. These actions were allegedly in retaliation for the NLRB charge.

Plaintiff filed a second EEOC charge on November 13, 1985, complaining of these actions. Plaintiff does not indicate exactly what happened next, but apparently she was reinstated at the restaurant, as she alleges that she was laid off from the restaurant by Galazzo in January 1986. After plaintiff requested the union to intercede on her behalf again, plaintiff was terminated for the third time on some unspecified date after March 17, 1986. Galazzo informed a third party that plaintiff was the owner of the restaurant, prompting the third party to sue plaintiff instead of the restaurant for back wages. Plaintiff alleges that at a subsequent EEOC hearing, Stewart and Galazzo testified that they had implemented this termination. In Spring and Summer 1986, Galazzo denied plaintiff unemployment benefits, and in January 1987, Stewart, Bohn, and Huy gave false testimony about plaintiff at an unemployment appeals board hearing. According to plaintiff, the unemployment appeals judge ruled that plaintiff's third termination was wrongful.

Upon plaintiff's demand, the EEOC issued plaintiff a right-to-sue letter for her 1984 and 1985 EEOC charges on December 30, 1986. Plaintiff alleges that she received this letter on January 24, 1987.

II. Defendants' Alleged Violations of Law.

Plaintiff filed the instant action on April 24, 1987. In his order of January 17, 1990, Judge Schwarzer directed plaintiff to "state specific facts indicating that she could prove acts of intentional discrimination" against each individual defendant, and noted that "[i]t will not do simply to allege conspiracies of generalized discriminatory practices." In her third complaint, plaintiff has failed to link up defendants Schupak, Huy, Bohn, and Stewart with specific actionable conduct that has harmed her; hence, they must be dismissed from this action.

A. Donald Schupak.

Plaintiff alleges that Schupak was the CEO of the restaurant, and was "solely responsible" for its management and operation.

(Compl't ¶ 10.) She also alleges that various acts taken by defendants La Rosa and Galazzo were taken "under the direction of" Schupak. (*E.g.*, Compl't ¶¶ 17, 18, 19, 20, 25, 26.) But plaintiff never indicates what form of direction was given by Schupak to La Rosa or Galazzo, nor alleges that there were any communications between Schupak and La Rosa or Galazzo concerning her. Plaintiff's allegations do not suffice to link Schupak to any actions which imposed harm on plaintiff; the allegation that Schupak was CEO of an employer which allegedly violated plaintiff's rights is simply not enough to hold Schupak personally liable for any injury to plaintiff. Schupak is accordingly dismissed from this action.

B. Bui Duc Huy and Don Bohn.

Plaintiff's allegations regarding Huy and Bohn are minimal. She identifies Huy as a waiter from 1982 to 1983 and a Dining Room Director from 1983 onward. (Compl't ¶ 7.) She identifies Bohn as Comptroller from 1982 to 1983, and as Head Dining Room Director and Assistant General Manager from January 1985 onward. (Compl't ¶ 9.)

Plaintiff alleges that on November 8, 1985, Huy and Bohn held a meeting with plaintiff at which they gave her written and verbal notice of her termination, and that on November 9, Stewart and Galazzo reissued the termination notice on another form. She alleges that she was terminated in retaliation for filing charges with the NLRB on October 30, 1985. (Compl't ¶ 32.) Plaintiff does not allege, however, that Huy and Bohn made the decision to terminate her, but rather that they notified her of her termination. Given that Huy and Bohn were Dining Room Directors and given plaintiff's allegations (and the implications fairly to be drawn from them) about their responsibilities, it appears that they had no authority to make decisions regarding plaintiff's employment. That Bohn allegedly bore the title of "Assistant General Manager" is not a sufficient basis for the court to infer that Bohn possessed such authority absent some specific allegation to that effect. Plaintiff's allegation is insufficient to state a claim against Huy or Bohn.

Plaintiff does allege that Huy and Bohn gave false testimony about her in EEOC and unemployment appeals hearings. (Compl't ¶¶ 55, 59.) But such testimony is subject to an absolute privilege under California law. *See* Cal. Civ. Code § 47(2). Huy and Bohn cannot be held liable for their testimony.

Plaintiff further alleges that on November 9, 1985, Huy, Galazzo, and Bohn denied plaintiff's request for a letter of recommendation for purposes of retaliation and harassment. (Compl't ¶ 33.) However, plaintiff has not alleged, and presumably is unable to allege, that she sustained any harm as a result of their refusal to write letters of recommendation. Plaintiff does not allege that these defendants owed her a duty to write letters of recommendation, and the court knows of no such affirmative duty. Indeed, if defendants had written letters about plaintiff's job performance, the letters undoubtedly would have been less than flattering, and perhaps would have handicapped her in future employment searches more than the absence of letters did. This allegation does not suffice to state a claim against Huy or Bohn.

As plaintiff has failed to allege facts that would impose liability on Huy and Bohn, they are dismissed from this action.

C. Robert Stewart.

Plaintiff identifies Stewart as a waiter from 1981 to 1984 and a Dining Room Director from 1984 onward. (Compl't ¶ 8.) Plaintiff alleges that Stewart and Galazzo issued a termination notice to her on November 9, 1985. (Compl't ¶ 32.) Plaintiff also alleges that Stewart and Galazzo testified to the EEOC that they had implemented plaintiff's third termination, in the spring of 1986. (Compl't ¶ 53.) Plaintiff does not specifically allege, however, that Stewart took any part in the decisions to terminate her. Her conclusory allegation that he testified at some unspecified EEOC hearing that he had "implemented" the termination does not imply that it was his decision. Like Huy and Bohn, Stewart is not alleged to have had authority to make decisions regarding plaintiff's employment, and plaintiff's allegations about Stewart provide the court no basis from which to infer that authority.

Finally, plaintiff alleges that Stewart gave false testimony about plaintiff in an unemployment appeal hearing. (Compl't ¶ 55.) As noted above, such testimony is subject to an absolute privilege under California law. *See* Cal. Civ. Code § 47(2). Stewart cannot be held liable for this testimony.

As plaintiff has failed to allege facts that would impose liability on Stewart, he is dismissed from this action.

D. Emotional Distress Claim.

Plaintiff's claim for emotional distress is governed by a one-year statute of limitations. *See* Cal. Civ. Proc. Code § 340(3); *Murphy v. Allstate Ins. Co.*, 83 Cal. App. 3d 38, 50, 147 Cal. Rptr. 565, 575 (4th Dist. 1978). Therefore, only conduct that plaintiff alleges occurred within one year of the date this action was filed -- that is, conduct that allegedly occurred after April 24, 1986 — may serve as a basis for plaintiff's claim.

Only two of plaintiff's allegations involve conduct that arguably occurred after April 24, 1986. First, plaintiff alleges that in January 1987, defendants Stewart, Bohn, and Huy gave false testimony under oath. (Compl't ¶ 55.) But, as noted above, this testimony is subject to an absolute privilege under California law, and cannot serve as the basis for any claim. *See* Cal. Civ. Code § 47(2). Second, plaintiff alleges that in Spring and Summer of 1986, Galazzo denied her unemployment benefits. (Compl't ¶ 54.) It is unclear whether this denial is within the limitations period, as plaintiff does not allege a specific date on which the denial took place. Furthermore, plaintiff does not allege what Galazzo's role was in the denial of unemployment benefits. This bare allegation is an insufficient hook upon which to hang a claim against Galazzo. Thus, no conduct which could form the basis for an emotional distress claim occurred within one year of the filing of this action. Nor do any equitable tolling doctrines operate to save this claim. *See Arnold v. United States*, 816 F.2d 1306, 1312-13 (9th Cir. 1987) (assertion of Title VII claim before EEOC does not toll statute of limitations applicable to claim for

infliction of emotional distress). Plaintiff's claim is time barred, and therefore is dismissed.[2]

E. Equal Pay Act Claim.

An action brought under the EPA is barred unless commenced within two years after the cause of action arises, except where the violation of the Act was "wilful," in which case the action may be commenced within three years. 29 U.S.C. § 255. The United States Supreme Court has recently determined that a violation is "wilful" only if the employer knew or showed reckless disregard whether its conduct was prohibited by the statute. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). It is not enough that the employer was aware that the EPA was "in the picture." *Id.*

Plaintiff does not allege that the defendants knew that they were violating the EPA, or even that they were reckless with regard to such violations. Plaintiff alleges that in Spring 1983 she was paid only hostess wages for managerial work; that in Summer 1983 she managed the Garden Terrace Restaurant, but was not paid managerial wages, as the previous manager — a male — had been; and that in Spring 1984 she acted as dining room director two or three days a week, but was not paid managerial wages. (Compl't ¶¶ 38, 39, 44.) In her conclusory assertion of her EPA claim, plaintiff nowhere alleges that any defendant knew he was violating the Equal Pay Act, nor that any defendant was being reckless. (Compl't ¶¶ 46-49.) There is no indication in plaintiff's complaint that defendants "wilfully"

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[2] Even if plaintiff's claim for intentional infliction of emotional distress were not time barred, it would largely be barred by the decision in *Foley v. Interactive Data Systems*, 47 Cal. 3d 654, 254 Cal. Rptr. 211 (1988). In that case, the California Supreme Court held that an employee may not recover tort damages for breach of the implied covenant of good faith and fair dealing, as the covenant is a contract term, breach of which will sustain an award only of contract damages. This decision is fully retroactive. *Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 258 Cal. Rptr. 592 (1989). To the extent that plaintiff complains of conduct that resulted in her "wrongful termination," she cannot recover tort damages for her emotional distress arising from that conduct.

violated the EPA. Accordingly, the two-year statute of limitations applies to plaintiff's action.

The most recent conduct that plaintiff alleges violates the EPA took place in Spring 1984; this suit was not filed until April 24, 1987, more than two years later. Plaintiff's claim under the EPA is thus barred by the statute of limitations.

F. Retaliation Claim.

Plaintiff asserts a claim for "retaliation," presumably a common law claim for wrongful termination in retaliation for her union and EEOC activities. Judge Schwarzer's January 17 order, however, dismissed plaintiff's wrongful termination claim without leave to amend, because such a claim cannot be asserted against individual employees. Plaintiff's claim for retaliation is dismissed.

G. Title VII Claim.

Defendants contend that the court must dismiss all Title VII claims, because defendants were not named as respondents in the charges that plaintiff filed with the EEOC.[3] Title VII provides in pertinent part that "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . . ." 42 U.S.C. § 2000e-5(f)(1). In both her EEOC charges, plaintiff named Maxwell's alone as the respondent.

The Ninth Circuit in at least one case relaxed the exhaustion requirement to allow persons unnamed in the EEOC charge to be sued in civil actions. *See Kaplan v. International Alliance*, 525 F.2d 1354 (9th Cir. 1975). In that case, a union's international was held properly sued even though never named in an EEOC charge, where the international's involvement was

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[3] Judge Schwarzer rejected this contention in his order of July 1989. However, the parties have raised this issue again, and this action now is before the undersigned. While a prior determination of legal issues should normally be followed as "law of the case," reconsideration is justified where the prior decision was "clearly erroneous and would result in injustice." *See Handi Inv. Co. v. Mobil Oil Corp.*, 653 F.2d 391 (9th Cir. 1981). The court finds that reconsideration of this issue is justified.

evident from the factual statement contained in the EEOC charge and where the union's local affiliate was named as the respondent. *Id.* at 1358-59. Other circuits have permitted unnamed parties to be sued where there is a "sufficient identity of interests" between the named and unnamed parties, *see Gonzalez-Aller Balseyro v. GTE Lenkurt*, 702 F.2d 857, 859-60 (10th Cir. 1983), or where the parties are "substantially identical" entities, *see Sedlacek v. Hatch*, 752 F.2d 333, 334-36 (8th Cir. 1985). It thus appears that where there is a sufficiently close relationship between the defendant and the party named in the EEOC charge, an otherwise barred action may proceed.

La Rosa is mentioned in the factual statement of plaintiffs 1984 EEOC charge, and Galazzo in that of her 1985 charge. However, this is not a case like *Kaplan*; while a union's international possesses a substantial identity of interests with its local affiliate for purposes of defending an EEOC claim, a restaurant's general manager does not have that identity of interests with the restaurant itself. Furthermore, La Rosa and Galazzo were not put on notice that they might be subject to a civil suit months or years later merely because plaintiff named their employer as respondent in an EEOC charge. Defendants did not have the opportunity to participate in the EEOC conciliation process as respondents, and could not have realized that they should collect evidence sufficient to defend themselves in a subsequent civil suit. It would be inequitable to allow plaintiff to proceed against La Rosa and Galazzo.[4] Accordingly, plaintiff's Title VII claims are dismissed.

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[4] The court has considered dicta in *Kaplan* from which one might argue that mention of a party's name in the EEOC factual statement is sufficient to permit an action to proceed against that party even if unnamed in the EEOC charge. Such an interpretation extends beyond the holding in *Kaplan* and, as the present facts aptly illustrate, would undermine the exhaustion requirement. Plaintiff here seeks to impose individual liability against former employees of a now bankrupt firm with which plaintiff has settled for conduct within the course and scope of the employees' employment. To permit plaintiff to proceed here against La Rosa and Galazzo, after their omission from the EEOC charge, would have the effect of making them their employer's insurance carrier for plaintiff's claim.

H. ADEA Claims.

Defendants contend that: (1) plaintiff's ADEA claims are barred by the applicable statute of limitations; (2) plaintiff's claims are barred because of her laches; and (3) her allegations fail to state claims on which relief can be granted.

1. La Rosa.

Like an action brought under the EPA, an ADEA action is barred unless commenced within two years after the cause of action arises, except where the violation of the Act was "wilful," in which case the action may be commenced within three years. 29 U.S.C. § 255. Since there is no allegation that La Rosa knew that he was violating the ADEA, or even that he was reckless with regard to such violations, a two-year statute of limitations applies to plaintiff's claim. This limitations period is tolled for up to one year during the EEOC conciliation process. 29 U.S.C. § 626(e)(2). Because plaintiff's EEOC conciliation process began on October 18, 1984, and continued at least until August 28, 1986,[5] the limitations period applicable to her claim is tolled for one year. In sum, only conduct that plaintiff alleges occurred within three years of the date this action was filed — that is, conduct that allegedly occurred after April 24, 1984 — may serve as a basis for her ADEA claim against La Rosa.

Most of plaintiff's allegations regarding La Rosa concern acts of discrimination that took place between Fall 1982 and April 24, 1984, and thus are time barred.[6] But plaintiff does allege several actions taken by La Rosa between April 27, 1984, and July 1,

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[5] *See* Oct. 16, 1989 Links Decl. at Ex. E.

[6] Where alleged violations are continuing and closely related in nature, the limitations period will not bar a claim as long as one or more of the violations falls within the limitations period. *See Green v. Los Angeles Cty. Superintendent of Schools*, 883 F.2d 1472, 1480-81 (9th Cir. 1989); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918 (9th Cir. 1982). The violations that plaintiff alleges, however, are not closely related in nature, ranging from harassing language, to failure to promote, to termination.

1984, that might state an ADEA claim against him.[7] After much consideration, however, the court concludes that plaintiff's ADEA claim against La Rosa must be dismissed because of her laches.

The defense of laches requires proof of "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Bratton v. Bethlehem Steel Corp.*, 649 F.2d 658, 666-67 (9th Cir. 1980). Thus, in *Boone v. Mechanical Specialties Co.*, 609 F.2d 956 (9th Cir. 1979), summary judgment for defendants was granted where affidavits indicated a plaintiff had delayed seven years before seeking a right-to-sue letter from the EEOC.[8]

Plaintiff has failed to pursue her ADEA claim diligently. Although aware of La Rosa's allegedly discriminatory practices since the Fall of 1982, she did not file any action against him until more than four years had elapsed. Furthermore, as noted above, La Rosa has been prejudiced by plaintiff's failure to proceed against him. Unaware that he would be the defendant in a civil suit, and not even an employee of Maxwell's after January 1985, La Rosa had no opportunity to assemble and maintain the materials necessary to defend this action. Plaintiff's laches must bar her ADEA claim against La Rosa.

2. Galazzo.

Plaintiff's ADEA claim against Galazzo can be based only on alleged acts of discrimination and retaliation that are the subject of plaintiff's 1985 EEOC charge, in which she refers to Galazzo for the first time. These allegations, involving plaintiff's second termination, are not barred by the statute of limitations, as they

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[7] Plaintiff also alleges that La Rosa gave false testimony in March 1985; as noted, such testimony is privileged, and cannot serve as the basis for liability. *See* Cal. Civ. Code § 47(2).

[8] The defense of laches is typically raised on a motion for summary judgment, so that the court has the benefit of affidavits setting forth facts regarding lack of diligence and prejudice. *See McCune v. F. Alioto Fish Co.*, 587 F.2d 1244, 1250 (9th Cir. 1979). Here, taking all plaintiff's allegations as uncontested facts, the court is able to make a determination as to the defense of laches.

all occurred within two years of the filing of this action. However, these allegations fail to state a claim on which relief can be granted.[9]

Plaintiff's fundamental claims under the ADEA against Galazzo are for retaliation. To establish a claim for retaliation under the ADEA against a defendant, a plaintiff must allege that (1) she engaged or was engaging in protected activity, (2) the defendant subjected her to an adverse employment decision, and (3) there was a causal link between the protected activity and the defendant's action. *See Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987) (Title VII case). Importantly, the ADEA considers an employee to have engaged in "protected activity" only when the employee "made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or litigation under this chapter [i.e. before the EEOC]." 29 U.S.C. § 623(d).

Plaintiff alleges that Galazzo made harassing remarks to her in a meeting on October 18, 1985. (Compl't ¶ 30.) But she

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[9] Plaintiff also complains of the circumstances of her *third* termination, though her 1985 EEOC charge mentions only the second termination.

Incidents of discrimination that occur after the filing of an EEOC charge but are "not included in an EEOC charge may not be considered by a federal court unless the new claims are 'like or reasonably related to the allegations contained in the EEOC charge.'" *Green v. Los Angeles Cty. Superintendent of Schools*, 883 F.2d 1472, 1475-76 (9th Cir. 1989) (Title VII case), *quoting Oubichon v. North American Rockwell Corp.*, 482 F.2d 569 (9th Cir. 1973) (Title VII case) . In determining whether an allegation under Title VII is "like or reasonably related" to allegations contained in a previous EEOC charge, the court should inquire whether the original EEOC investigation would have encompassed the additional charges. *Green*, 883 F.2d at 1476.

Here, although the EEOC investigation apparently did address the third termination, the third termination took place four months after the second termination, and involved an entirely separate set of facts. Plaintiff alleges that she was laid off, only to find that a younger employee had taken her place, and that she was then terminated for a third time on some unspecified date after March 17, 1986. Plaintiff also alleges that Galazzo denied her unemployment benefits in Spring and Summer 1986. The court concludes that these allegations are not like or reasonably related to the allegations in plaintiff's EEOC charge. Thus, this action cannot encompass the circumstances of plaintiff's third termination.

nowhere alleges that these remarks were causally linked to her activities before the EEOC and, therefore, fails to state a claim for retaliation. Plaintiff also alleges that some unspecified "defendants" refused to assign her a full working schedule, in part because of her filing charges and giving testimony before the EEOC. (Compl't ¶ 31.) But plaintiff does not allege that Galazzo himself took part in setting her working schedule, nor does she allege any specifics of this adverse employment decision. Accordingly, this allegation too fails to state a claim. Finally, plaintiff alleges that her second termination was in retaliation for filing charges with the NLRB. (Compl't ¶ 32.) Again, this allegation fails to state a claim upon which relief can be granted, because plaintiff does not allege that her termination was causally linked to her activities before the EEOC.

Accordingly, plaintiff's ADEA claim against Galazzo must be dismissed.

III. Conclusion.

Plaintiff's claims against defendants Schupak, Huy, Bohn, and Stewart are dismissed with prejudice for failure to state a claim on which relief can be granted.

Plaintiff's claims under the Equal Pay Act and for intentional infliction of emotional distress are barred by the applicable statutes of limitations, and are dismissed with prejudice. Plaintiff's claim for retaliation is also dismissed with prejudice.

Plaintiff's claims under Title VII are dismissed with prejudice because she failed to name defendants in her EEOC charges, and her claims under the ADEA are dismissed with prejudice because

of plaintiff's laches and because her allegations fail to state a claim on which relief can be granted.

As this action is dismissed in its entirety, plaintiff's request for appointment of counsel is denied.

IT IS SO ORDERED.

DATED: May 18, 1990

/s/
VAUGHN R. WALKER
United States District Judge

APPENDIX C

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAY 18, 1990

UNITED STATES COURT OF APPEALS
NORTHERN DISTRICT OF CALIFORNIA

May 18, 1990

PHYLLIS MILLER,	§	
Plaintiff,	§	
v.	§	No. C-87-1906-VRW
MAXWELL'S INT. INC.;	§	
DINO LA ROSA, et al.,	§	
Defendants.		

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that, in accordance with the Order filed May 18, 1990, this action is dismissed in its entirety. Judgment is hereby entered in favor of the defendants and against plaintiff Phyllis Miller.

APPENDIX D

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JULY 28, 1993

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHYLLIS MILLER,	§	
Plaintiff-Appellant,	§	
v.	§	
MAXWELL'S INTERNATIONAL	§	
INC., dba Maxwell's Plum,	§	
Debtor in possession; CARLO	§	
GALAZZO, Gen. Mgt. DINO LA	§	No. 90-16286
ROSA; DON BOHN; DON	§	
SCHUPAK, et al.,	§	D.C. No. CV-87-01906-VRW
Defendants-Appellees.	§	
	§	
EQUAL EMPLOYMENT	§	
OPPORTUNITY COMMISSION, as	§	
amicus,	§	
Amicus.	§	

ORDER

Before: FLETCHER, WIGGINS, and KOZINSKI, Circuit Judges

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

THIRD AMENDED COMPLAINT FOR DAMAGES TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

FEBRUARY 1, 1990

PHYLLIS MILLER
6440 Wornall Road
Kansas City, Missouri 64113
Telephone: (816) 333-9666

Plaintiff, Pro Se

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PHYLLIS MILLER,	§	No. C-87-1906-WAS
Plaintiff,	§	THIRD AMENDED
v.	§	COMPLAINT FOR
DINO LA ROSA, an individual,	§	DAMAGES
CARLO GALAZZO, an	§	JURY TRIAL
individual, DON BOHN, an	§	TITLE VII
individual, ROBERT STEWART,	§	AGE DISCRIMINATION,
an individual, DONALD	§	EQUAL PAY ACT,
SCHUPAK, an individual,	§	RETALIATION,
Defendants.	§	INTENTIONAL
	§	INFLICTION OF
	§	EMOTIONAL DISTRESS

Plaintiff alleges:

I. JURISDICTION

1. This complaint is brought pursuant to Title VII 42 U.S.C. §2000e(b); the Age Discrimination in Employment Act 29 U.S.C. §621, the Labor Standards Act 29 U.S.C. §626(b); the Equal Pay Act 29 U.S.C. §206(d); and the National Labor Relations Act 29 U.S.C. §157,158,(a)3. Jurisdiction is pursuant to 28 U.S.C. §1331, 1337, 1343, and the Civil Rights Act of 1964 §706(f)(3).

II. COMMON CHARGING ALLEGATIONS

2. This action for gender and age discrimination in employment, for wrongful termination, and for violation of the National Labor Relations Act is now brought against various individual management employees of Maxwell's Plum ("Maxwell's"). On October 18, 1984 and on November 18, 1985

plaintiff filed timely charges #091-85-0037 and #091-86-0183 with the E.E.O.C. following the occurrence of the discriminatory acts of which she complains herein. Plaintiff requested and received two Notices of Right to Sue from the E.E.O.C. and there was a timely filing of these notices with this court. The unlawful employment practice alleged herein were committed within the geographic jurisdiction of the U.S. District Court of the Northern District of California.

3. At all material times herein plaintiff Phyllis Miller, a female over the age of forty, has been discriminated against by each and all of the defendants on the basis of age and gender by being denied promotion to and training for the positions of Restaurant Director, Assistant General Manager and/or Head Restaurant Director, General Manager, and Banquet Director. As a result of this discrimination in employment, the plaintiff was paid lower wages because of the defendants' failure to promote her based on age and gender. Further acts of age and gender discrimination against plaintiff by the defendants were harassment, three wrongful terminations, and retaliation because of plaintiff's opposition to practices made unlawful by Title VII, the Age Discrimination in Employment Act, the Equal Pay Act, the Fair Labor Standards Act, and the National Labor Relations Act, and based on plaintiff's part in proceedings under those acts.

III. PARTIES

4. At all material times herein, plaintiff Phyllis Miller, a female, a citizen of the United States, birth date 2/8/38, over the age of forty, was employed by the defendants at Maxwell's 1982-1986.

5. At all material times herein, defendant Dino La Rosa was an employee of Maxwell's holding the position of General Manager until 1985.

6. At all material times herein, defendant Carlo Galazzo was an employee of Maxwell's, first holding the position of Executive Chef until 1985, and then holding the position of General Manager from 1985 until 1989.

7. At all material times herein, defendant Bui Duc Huy was an employee of Maxwell's, holding the position of Waiter from 1982-1983 and has held the position of Dining Room Director from 1983 on.

8. At all material times herein, defendant Robert Stewart was an employee of Maxwell's holding the position of Waiter from 1981-1984, and has held the position of Dining Room Director from 1984 on.

9. At all material times herein, defendant Don Bohn was an employee of Maxwell's, holding the position of Comptroller from March, 1982 until August, 1983. He left Maxwell's and came back to assume the position of Head Dining Room Director (Assistant General Manager) in January, 1985 for several years.

10. At all material times herein, defendant Donald Schupak has been employed by Maxwell's as a Restaurant Consultant, the sole Director, President, Chairman of the Board, C.E.O., and has been "solely responsible" for the management and operation herein of Maxwell's.

11. At all material times herein, plaintiff is informed and believes and alleges that the defendants, and each of them, was the agent of the other in doing the things hereinafter alleged and was acting within the course and scope of such agency with permission and consent of his co-defendants.

IV. CAUSE OF ACTION FOR AGE DISCRIMINATION

12. Plaintiff incorporates by reference Sections V, VI, VII, and VIII as though more fully set forth herein. Everything alleged as age discrimination is also alleged as sex discrimination and everything alleged as sex discrimination is also alleged as age discrimination.

13. January, 1984, defendant, Dino La Rosa under the direction of Donald Schupak, discriminatorily reduced plaintiff's hours. A male, under forty years of age, from the catering division was given plaintiff's hours. Plaintiff was put in the basement answering phones. At plaintiffs' request, the Hotel and

Restaurant Employees and Bartenders Union Local 2 ("Local 2") successfully intervened on her behalf.

14. Spring and Summer, 1984, to retaliate and harass plaintiff, defendant Dino La Rosa discriminated against plaintiff by refusing to talk to her after Local 2 intervention. The defendants under the direction of Donald Schupak willfully created a hostile working environment for plaintiff from this point forth.

15. Spring and Summer, 1984, defendant Carlo Galazzo discriminated in retaliation against plaintiff by harassing her and pointing her out in front of other employees and customers about defendant Dino La Rosa's refusal to talk to plaintiff.

16. Defendant Dino La Rosa discriminated against plaintiff on the basis of age and retaliation by replacing her with two young females from the coat check stand to work as hostess.

17. Spring, 1984, defendant Dino La Rosa, under the direction of Donald Schupak, in retaliation and age discrimination, eliminated plaintiff's phone answering hours. A part-time employee under the age of forty was given plaintiff's hours, forcing the younger employee to work overtime.

18. Late Spring and Summer, 1984, defendant Dino La Rosa under the direction of Donald Schupak, discriminated against plaintiff by writing false letters about plaintiff's job performance to harass and retaliate against plaintiff because of her Local 2 activities, and her claims of gender and age discrimination. At plaintiff's request, Local 2 again successfully intervened on plaintiff's behalf. Defendant's counsel, Richard Mann, and Local 2 representative, Mike Welch, made an agreement that Local 2 would not file a grievance if defendant Dino La Rosa destroyed the letters and quit harassing plaintiff. The defendants did not honor this agreement. The basis of this act was retaliation, harassment, age and gender discrimination.

19. Spring, 1984, defendant, Dino La Rosa, under the direction of Donald Schupak, accommodated an employee under the age of forty by reducing her hours. Defendants altered the schedule to prevent plaintiff from receiving these hours, and paid another employee under forty some overtime and additional

benefits. The basis of this act is age discrimination, retaliation and harassment.

20. April 8, 1984-June, 1984, a hostess with more seniority than plaintiff quit. Her hours should have gone to plaintiff. Defendant Dino La Rosa under the direction of Donald Schupak distributed these hours to other employees under the age of forty with no seniority in this division. The basis of this act is age discrimination, retaliation and harassment.

21. May or June, 1984, defendant Dino La Rosa again discriminatorily denied plaintiff's request for front of the house management. To *torment* plaintiff, defendant La Rosa told her that she was "too old" and that she was "almost ready to retire and get social security," to "go home and get a rich husband again." Defendant Dino La Rosa also denied plaintiff's request for any training on the basis of age discrimination.

22. Late April, May and June, 1984, defendants Dino La Rosa and Carlo Galazzo, discriminated on the basis of age and gender, denying plaintiff any culinary training, which defendant Dino La Rosa had previously promised. At the same time, a male employee under the age of forty and another male under the age of forty, not an employee, whose father was Carlo Galazzo's friend, were given culinary training in the Catering Department.

23. May or June, 1984, defendant Carlo Galazzo discriminated on the basis of age by refusing management and culinary training to plaintiff because he told her she was "too old to waste time training for management."

24. May and June, 1984, defendants Dino La Rosa and Carlo Galazzo willfully and wantonly jeered and ridiculed plaintiff repeatedly in loud voices in front of other employees and customers about her being "too old." They both laughed about being able to torment and ridicule plaintiff, causing plaintiff great embarrassment and emotional distress. The basis of this act was age discrimination, harassment and retaliation.

25. May and June, 1984, defendant Dino La Rosa, under the direction of Donald Schupak, discriminated on the basis of age and gender by denying plaintiff's request to be allowed to

perform even basic management duties to get experience. Plaintiff volunteered to do these duties free, in addition to her regular schedule.

26. June, 1984, defendant Dino La Rosa under the direction of Donald Schupak discriminated on the basis of age by requiring plaintiff to train a new employee under the age of forty to be a hostess. The defendants then reduced plaintiff's hours, giving them, along with additional hours, to this younger employee. Plaintiff objected to defendants Dino La Rosa and Carlo Galazzo about this discriminatory schedule. Defendant Dino La Rosa stated that nobody could tell him what to do and she could go work somewhere else.

27. July, 1984, defendants Dino La Rosa under the direction of Donald Schupak terminated plaintiff, who was over the age of forty, performing her work satisfactorily, to replace her with an employee under the age of forty. Defendant Dino La Rosa laughed and told plaintiff, "I got rid of you, now go tell your union!" The basis of this act was age discrimination, retaliation, and harassment.

28. July, 1984, Local 2 filed a grievance on plaintiff's behalf, which she won at a binding arbitration, held over a year later. Plaintiff filed a timely E.E.O.C. charge #091-85-0037, July, 1984 and N.L.R.B. charge #20-CA-19377, November 19, 1984 against defendants.

29. July, 1984-Fall, 1988, the defendants, under the direction of Donald Schupak, stalled for over a year before going to arbitration, delayed putting plaintiff back to work, refused to honor the binding agreement, and to further harass and retaliate against plaintiff, removed the case to the New York Bankruptcy Court, causing unnecessary delay and an additional financial burden for the plaintiff. The New York Court ruled on plaintiff's behalf, September 29, 1988. Defendants' stalling was in retaliation and harassment and was intended to cause plaintiff emotional distress.

30. October 18, 1985, defendant Carlo Galazzo held a meeting with plaintiff, in a willful and wanton attempt to threaten and

intimidate her. He told plaintiff, "I tell you, you have a hard time . . . if you want to be here at the restaurant." "Things will get worse, not better, believe a that, believe me." The defendant was referring to Donald Schupak when he stated, "They don't want you here." "You will never go to the dining room, as long as I'm here. You'll never go to the dining room," was the defendant's was reference to plaintiff's chances of being promoted to front of the house management. After the meeting with the plaintiff, defendant Carlo Galazzo bragged to other employees about his threats to plaintiff and repeated them. This basis of this meeting was retaliation and harassment intended to give plaintiff emotional distress and intimidate her into quitting.

31. October 14-28, 1985, defendants retaliated against plaintiff by failing and refusing to assign her a full working schedule because of her Local 2 activities, and because she filed charges and gave testimony to the N.L.R.B. and E.E.O.C. An employee under the age of forty with less seniority continued to receive hours that should have gone to plaintiff. This act was done on the basis of retaliation, age discrimination and harassment.

32. October 30, 1985, plaintiff filed a second N.L.R.B. charge #20-CA-19971 against the defendants stating denial of a full working schedule. Immediately upon receiving this complaint, the defendants, Bui Duc Huy and Don Bohn, under the direction of Donald Schupak, on November 8, 1985, held a meeting with plaintiff, giving plaintiff written and verbal notice of her second termination. On November 9, 1985 defendants Robert Stewart and Carlo Galazzo reissued the termination notice on another form. This act was in retaliation because plaintiff filed charges and gave testimony to the N.L.R.B.

33. November 9, 1985, defendants Carlo Galazzo, Bui Duc Huy, and Don Bohn discriminatorily denied plaintiff's request for a letter of recommendation. The basis of this act was retaliation and harassment.

V. CAUSE OF ACTION FOR SEX DISCRIMINATION

34. Plaintiff incorporates by reference Sections IV, VI, VII, and VIII as though more fully set forth herein. Everything alleged as sex discrimination is also alleged as age discrimination and everything alleged as age discrimination is also alleged as sex discrimination.

35. August, 1982, plaintiff Phyllis Miller, a female, applied for a management training job at a restaurant, Maxwell's Plum in San Francisco, California and was hired by defendant Dino La Rosa as a hostess.

36. Plaintiff accepted the hostess position with defendant Dino La Rosa's promise she would be promoted as soon as a higher position came open.

37. Defendants Dino La Rosa and Carlo Galazzo both knew plaintiff had over ten years of successful management experience, and knew of her management expertise, having been customers of hers in Kansas City, Missouri.

38. Spring, 1983, plaintiff successfully managed a breakfast room for the restaurant and was only paid hostess wages in violation of the Equal Pay Act.

39. Summer, 1983, plaintiff managed the Terrace Garden for the restaurant. Defendant Dino La Rosa told plaintiff that "her work performance was excellent and that her attendance record was unblemished" and defendant gave plaintiff a letter to that effect. Plaintiff was not paid managerial wages for the work at that level although the prior male who performed substantially similar duties was paid managerial wages in violation of the E.P.A. and Title VII.

40. Fall, 1983, plaintiff informed defendant Carlo Galazzo she was being discriminated against on the basis of gender by being denied promotion to dining room director. Defendant Galazzo immediately walked over to defendant Dino La Rosa to inform him of plaintiff's discrimination complaint.

41. Fall, 1982, Fall, 1984, Spring, 1984, Summer, 1984, defendant Dino La Rosa discriminated against plaintiff by passing

her over when promotion opportunities became available and by promoting males with equal or less management expertise.

42. May, 1984, plaintiff asked defendant Dino La Rosa why she was being passed over for management positions and he told her, "I've tried women before and they're nothing but trouble and I'll never do it again." Plaintiff informed defendant Dino La Rosa that was "sex discrimination."

43. May, 1984, defendant Carlo Galazzo stated to plaintiff that in his country, it was embarrassing if women had to work, and that plaintiff should "go home," when plaintiff asked him why he was against her being promoted. This statement is gender discrimination.

44. Spring, 1984, plaintiff replaced her immediate superior two to three days a week as dining room director on his days off, performing substantially the same duties. Plaintiff was not paid managerial wages for that work in violation of the E.P.A. and Title VII.

45. May-June, 1984, defendant Dino La Rosa discriminated against plaintiff by denying her request to work as a banquet director trainee on the basis that "girls would cause trouble." The basis of this act was gender discrimination.

VI. CAUSE OF ACTION FOR VIOLATION OF THE EQUAL PAY ACT

46. Plaintiff incorporates by reference Sections IV, V, VII and VIII as though more fully set forth herein and all allegations of violations of the Equal Pay Act as more fully described therein.

47. The defendants each and all have denied plaintiff compensation and benefits received by other employees who were male.

48. Plaintiff performed substantially the same duties as males who received higher pay and greater benefits.

49. Plaintiff was injured by not receiving equal pay and benefits as a result of these discriminatory actions by the defendants each and all.

VII. CAUSE OF ACTION FOR RETALIATION

50. Plaintiff incorporates by reference Sections IV, V, VI, and VIII as though more fully set forth herein. There are many other acts of retaliation described within these other sections.

51. January, 1986, plaintiff was laid off by defendant Carlo Galazzo.

52. February 8, 1986, plaintiff discovered a younger employee, under the age of forty, with less seniority working in plaintiff's position. Plaintiff requested and received Local 2's attempt to intervene on her behalf to let her return to work.

53. March 17, 1986, defendant Donald Schupak's counsel, Richard Mann, on his behalf, refused to correct this willful act of age discrimination and retaliation against plaintiff described in paragraph 52. The defendants then terminated plaintiff for a third time. Defendants Carlo Galazzo and Robert Stewart testified to the E.E.O.C. that they too had implemented this discharge.

54. Spring and Summer, 1986, defendant Carlo Galazzo, under the direction of Donald Schupak, retaliated against plaintiff by denying her unemployment benefits.

55. January 5, 1987, defendants Robert Stewart, Don Bohn, and Bui Duc Huy, under the direction of Donald Schupak, under oath at an interstate unemployment appeals board hearing, gave false testimony about the plaintiff intended to cause her harm.

56. January 29, 1987, the unemployment appeals board judge, Judge Richard E. Lehmann, ruled on plaintiff's behalf that she had been wrongfully terminated. This third wrongful termination that is now before this court, is part of the basis of plaintiff's claims for damages.

VIII. CAUSE OF ACTION FOR EMOTIONAL DISTRESS

57. Plaintiff incorporates by reference Sections IV, V, VI and VII as though more fully set forth herein. Some of the acts described below were intended to cause plaintiff emotional distress and suffering and are more fully set forth in the above sections.

58. The defendants, each and all of them, have set out to deliberately cause plaintiff emotional distress that she would voluntarily quit working at Maxwell's. These discriminatory acts against plaintiff were because she pursued her legal, civil, and constitutional rights as more fully described in the above sections.

59. March 16, 1985, defendants Dino La Rosa and Bui Duc Huy gave false testimony under oath to the E.E.O.C. about plaintiff. The defendants caused plaintiff emotional distress by their derogatory testimonies about plaintiff's job performance on this and other occasions referred to in previous sections.

60. March, 1986, defendant Carlo Galazzo informed LeeRoy Morrisette that plaintiff was the owner of Maxwell's and the one he should sue for the back wages due him. Mr. Morrisette then filed an action against plaintiff and served her with same. Defendant Carlo Galazzo's act of malicious prosecution was intended to and did cause plaintiff emotional distress and injury.

61. The defendants, each and all of them, knew that by reducing plaintiff's hours and by terminating her they would be creating a great financial burden for her as head of the household for her six children and disabled husband. All of the defendants' tactics and delays described in the above sections have indeed caused the plaintiff emotional distress.

62. Plaintiff has suffered and continues to suffer extreme mental stress, anxiety, depression, feelings of lack of self worth, rejection, and relegation to a second-class status due to the actions of the defendants and each of them. In addition, as a result of the above mental stress damages, plaintiff has been physically exhausted, run down, and unable to lead her life in a normal manner.

63. Plaintiff has not been able to find suitable employment because of the defamation of her character by the defendants, each and all of them, thereby causing her extreme emotional distress and suffering.

64. The defendants' willful and wanton acts of public humiliation at Maxwell's have caused the plaintiff great emotional distress and embarrassment.

65. The defendants' willful and wanton acts of reducing plaintiff's income while stretching her working time out over the whole week was intended to and did wear her out emotionally.

66. Plaintiff has suffered emotional distress because of the defendants' refusal to utilize her management skills and deliberately allowing her to perform only menial tasks.

Prayer for Relief

67. Wherefore, plaintiff, Phyllis Miller prays that this court enter judgment in her favor and against the defendants, and each of them, on each cause of action for injury to plaintiff for an amount in excess of ten million dollars or in an amount to be determined at trial.

68. That the court grant the plaintiff a jury trial pursuant to the Age Discrimination Act and for all other issues so triable.

69. And for such other and further relief as the court may deem just and equitable.

/s/

Phyllis Miller
6440 Wornall Road
Kansas City, Missouri 64113
(816) 333-9666
Plaintiff, Pro Se

APPENDIX F

ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

OCTOBER 17, 1988

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	§	Chapter 11 Case No. 83 B 11668 (BRL)
MAXWELL'S INTERNATIONAL, INC.,	§	ORDER
Debtor.	§	

ORDER

This matter having come before the Court for a hearing on September 29, 1988 on the Debtor's objections to the claim of Administration of Hotel and Restaurant Employees and Bartenders Union Local 2 ("Local 2") on behalf of Phyllis Miller in the amount of $24,000, the Motion of Local 2 for an Order Allowing and Directing the Debtor's Motion to Liquidate Unfiled Claim of Terminated Employee Phyllis Miller as zero and Classifying it as Unsecured and the Debtor's Cross-Motion for sanctions and Order Compelling Miller to File all Claims Which She Has or Hereafter May Assert, and the Debtor having appeared by its attorneys, Reavis and McGrath, Local 2 having appeared by its attorneys, Friedman, Levy-Warren & Moss, and Phyllis Miller having appeared *pro se*, and all parties having been heard, it is hereby Ordered as follows:

1. The Claim of Local 2 on behalf of Phyllis Miller in the amount of $24,000 is hereby allowed in its entirety as a claim of Administration and the Debtor is Ordered to pay Phyllis Miller the sum of $24,000 forthwith.

2. Phyllis Miller, on consent, is hereby enjoined from continuing or commencing against the Debtor any legal proceedings in this or any other Court with respect to any claims arising prior to the date of this Order.

3. All other relief requested is hereby denied.

Dated: New York, New York

October 17, 1988

/s/

United States Bankruptcy Judge

APPENDIX G

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JULY 26, 1989

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PHYLLIS MILLER,	§	
Plaintiff,	§	
v.	§	No. C-87-1906-WWS
CARLO GALAZZO, et al.,	§	
Defendants.	§	

ORDER

Plaintiff Phyllis Miller brings this action against various individual managerial officials of Maxwell's International. She asserts claims for sex discrimination, age discrimination, wrongful termination, breach of the implied covenant of good faith and fair dealing, retaliation, negligent and intentional infliction of emotional distress, and conspiracy.

Defendants move to dismiss the complaint for failure to state a claim or, in the alternative, for a more definite statement. Plaintiff seeks leave to file a second amended complaint, stating her claims more clearly.

The primary ground on which defendants move to dismiss is that they were not plaintiff's employer, and that she has already settled her claims against her employer. However, under the relevant statutes, the term "employer" includes agents of the company for which the plaintiff works. 42 U.S.C. § 2000e(b) (Title VII); 29 U.S.C. § 203(d) (Equal Pay Act); 29 U.S.C. § 630(b) (Age Discrimination in Employment Act); *see also, e.g., Hamilton v. Rogers*, 791 F.2d 439, 442-43 (5th Cir. 1986); *Jeter v. Boswell*, 554 F. Supp. 946 (N.D. W. Va. 1983) (and cases cited therein). Therefore, to the extent that defendants' motion is based on that ground it must be denied.

It is also not necessary for plaintiff to have named the individual management officials in her EEOC complaints so long as they had notice of her claims. *See, e.g., Kaplan v. International Alliance of Theatrical and Stages Employees and Motion Picture*

Operators, 525 F.2d 1354, 1358-59 (9th Cir. 1975); *Jeter*, 554 F. Supp. at 949-52.

The present complaint, however, is almost incomprehensible. Plaintiff is granted leave to file a second amended complaint. To comply with the rules, that complaint must be a short and plain statement of her claims.

To proceed against the individual defendants, plaintiff must state specifically, though briefly, what each defendant did and in what way that behavior was wrongful.

Plaintiff must also recognize that under the decision of the California Supreme Court in *Foley v. Interactive Data Systems*, 47 Cal. 3d 654 (1988), she cannot recover tort damages for acts performed on behalf of the employer. Plaintiff is advised to allege only damages that are supportable by the law and can be proved.

Copies of plaintiff's EEOC filings should be attached to the second amended complaint.

IT IS SO ORDERED.

DATED: July 25, 1989

/s/

WILLIAM W. SCHWARZER

United States District Judge

APPENDIX H

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JANUARY 17, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PHYLLIS MILLER,	§	
Plaintiff,	§	
vs.	§	No. C-87-1906-WWS
MAXWELL'S INTERNATIONAL,	§	
et al.,	§	
Defendants.		

ORDER

This is an action for gender and age discrimination in employment and for wrongful termination. Plaintiff, who was employed by Maxwell's International at the time of the alleged wrongful conduct, has heretofore settled with her employer. This action is now brought against various individual management employees of Maxwell's. Thus, the principal issue is whether these claims can be maintained against individuals other than the employer itself and, if so, what plaintiff must allege in her complaint to state a claim.

Plaintiff has created extraordinary difficulty for the Court by insisting on disregarding the Court's prior order concerning the form of her pleading and cluttering her complaint with pejorative, argumentative and irrelevant assertions and numerous citations to and quotations from legal authorities. Plaintiff must understand that this case cannot go forward to trial until there is a complaint which allows the Court and the parties to determine specifically what claims are asserted and the legal and factual basis for each. Were it not for the fact that plaintiff is appearing pro se (though apparently with legal assistance off stage), this action would be dismissed. With this order, the Court will give plaintiff one more opportunity to file a complaint that passes muster, and the requisite guidance to enable her to do so.

TITLE VII

The essence of plaintiff's complaint appears to be that Maxwell's excluded her from supervisory management positions

because of gender and age and ultimately terminated her on several occasions, possibly in retaliation for her complaints. She has settled these claims with Maxwell's. The question is whether she can recover additional damages from some of Maxwell's employees. According to the first amended complaint, these employees are Dino LaRosa, general manager until 1985, Carlo Galazzo, general manager after 1985, Don Bohn, comptroller and later also assistant general manager, Bui Duc Huy, dining room director, Robert Stewart, dining room director, and Donald Schupak, chief executive officer of Maxwell's.

The question whether individual members of management may be held personally liable for violation of Title VII is shrouded in uncertainty. The Ninth Circuit has held that under Title VII, "individual defendants cannot be held liable for back pay." *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982). There, the court refused to impose liability on a school superintendent and members of a school board who had terminated plaintiff, a school principal. This conclusion, however, does not necessarily govern the issue in this action. First, *Padway* concerned discriminatory actions taken by a school superintendent and by members of a school board, not actions taken by supervisory employees of a private employer, and no subsequent Ninth Circuit decision has extended *Padway's* rule to private employers. Several District Court decisions have extended *Padway* to encompass private employment as well, *see, e.g., Seib v. Elko Motor Inn*, 648 F. Supp. 272, 273 (D. Nev. 1986), but it is not clear that public officials are in the same position as individual managers of a private employer.

Second, *Padway* contains no analysis or discussion to support its conclusion, but relies on the language of Title VII that specifies back pay awards are to be paid by the "employer." Id.[1] However, Title VII defines "employer" as a person engaged in industry affecting commerce having fifteen or more employees

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[1] The *Padway* court also cited *Clanton v. Orleans Parish School Board*, 649 F.2d 1084, 1099 (5th Cir. 1981), a factually similar case which reached the same conclusion with as little analysis.

"and any agent of such a person." 42 U.S.C. § 2000e(b). The obvious purpose of this provision was to incorporate respondeat superior liability into the statute, and it is unlikely that Congress intended to impose personal liability on employees. But the text of the statute does not preclude such liability. A decision in the Fifth Circuit interpreted this definition of "employer" broadly to impose personal liability on fire department supervisors who intentionally discriminated against an employee on the basis of race in making job assignments and scheduling shifts. *Hamilton v. Rodgers*, 791 F.2d 439, 442-43 (5th Cir. 1986).

In the absence of definite guidance from the Ninth Circuit, the Court concludes that it may be possible for plaintiff to prove facts entitling her to relief and that therefore a complaint asserting individual liability for back pay cannot automatically be dismissed.

While the actual employer—Maxwell's—may be held liable for the acts of its managing employees, it does not follow that individual employees may also be held vicariously liable for acts done on the employer's behalf. Thus, if individual liability is to be imposed, it can only be for acts performed by the particular defendant sought to be charged. Accordingly, for plaintiff to state a claim against any individual defendant, she must state specific facts indicating that she could prove acts of intentional discrimination by that defendant. For example, she would have to allege that defendant X rejected her request for promotion and did so by words or under circumstances that indicate that his decision was based at least in part on gender. It will not do simply to allege conspiracies or generalized discriminatory practices. Plaintiff's first amended complaint contains considerable detail with respect to conduct by various defendants. From those allegations, it appears that only the general managers, La Rosa and, after him, Galazzo, performed acts that might form the basis for a claim. The fact that others might have been affected by those acts or expressed opinions about those acts does not give rise to a claim against them. Plaintiff should state each act directed at her specifically and clearly to make it possible to identify and address the specific claims asserted.

Any liability would, of course, be limited to back pay, and the amount recovered from Maxwell's under the settlement would be an offset against any judgment. It is well-settled that compensatory and punitive damages are not available under Title VII. *Shah v. Mt. Zion Hosp. and Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981). Nor could plaintiff obtain reinstatement, because defendants here are not in a position to carry out a reinstatement order. A reinstatement order would run only against Maxwell's, on whose payroll the plaintiff would be placed—but Maxwell's is not before the Court and has settled with plaintiff. Since front pay (lost future earnings) is an alternative remedy to reinstatement, it should not be awarded against individual defendants either.

Age Discrimination

The case for individual liability may be stronger under the Age Discrimination in Employment Act than under Title VII. *See House v. Cannon Mills Co.*, 713 F. Supp. 159 (M.D. N.C. 1988). Like Title VII, this act defines "employer" as including any agent of the actual employer. Furthermore, the act incorporates the remedies and procedures of the Fair Labor Standards Act, 29 U.S.C. § 626(b), under which liability has been imposed on individual management employees, though generally those having some ownership interest in the actual employer. *See House v. Cannon Mills Co.*, 713 F. Supp. at 160-62. If the Court's analysis with respect to liability under Title VII is correct, it applies equally here. Plaintiff is entitled to plead and prove that a specific employee took specific action affecting her employment intentionally based at least in part on age.

Equal Pay Act

For the reasons stated above, plaintiff is entitled to plead and prove that a specific employee took specific action with the intent to discriminate against plaintiff on the basis of gender with respect to the payment of wages. 29 U.S.C. § 206(d).

Retaliation

Plaintiff claims that defendants retaliated against her for exercising her constitutional and civil rights. That is not sufficiently specific to state a claim entitling her to go to trial. To assert a claim for retaliation, plaintiff must state specifically (1) what she did (such as filing complaints with the EEOC or NLRB), (2) what a specific defendant did that affected her adversely (such as threats, harassment, denial of a full working schedule, denial of letters of recommendation, and termination), and (3) what facts there are to indicate that it was done intentionally in retaliation.

Wrongful Termination

To assert a claim of wrongful termination under state law, plaintiff must allege that she had an express or implied contract entitling her to continued employment. In this case it does not appear that plaintiff had an express contract. An implied contract may arise from long continued service (which is not the case here) or from the employer's rules and regulations that create certain procedural rights. If the employer has in effect a procedure governing the discharge of its employees, its failure to follow that procedure may give plaintiff a claim. *Foley v. Interactive Data Systems*, 47 Cal.3d 654, 681-82, 254 Cal. Rptr. 211, 225-26 (1988) But such a claim would only be against the employer; since, after *Foley*, such a claim is in contract only, not in tort, it is not apparent how any claim could be stated against an individual employee who is not a party to the contract. Plaintiff's wrongful termination claim must therefore be dismissed without leave to amend.

Conspiracy

Plaintiff makes vague allegations against defendants concerning a conspiracy. Conspiracy does not afford her a separate basis for recovery. Any claim would have to be based on violation of one of the anti-discrimination statutes previously discussed, or of a common law rule. As plaintiff has given no

indication in her prior complaints that she will be able to allege facts sufficient to support a claim for conspiracy, this claim will be dismissed without leave to amend.

Infliction of Emotional Distress

Plaintiff may state a claim against individual defendants for infliction of emotional distress. To do so, however, she must identify the defendant to be charged and the specific acts committed by him amounting to outrageous conduct. More is required than merely offensive or insulting behavior.

Miscellaneous Charges

Plaintiff makes charges of fraud and perjury, and perhaps of a violation of the Racketeer Influenced and Corrupt Organizations Act. These charges appear to be frivolous and will be dismissed without leave to amend.

Statutes of Limitations

Some or all of the potential claims asserted may be barred by the statute of limitations. It is not possible from the present pleading to determine the relevant dates with sufficient certainty. The amended complaint should state specific dates to the extent possible.

Motion to Add Parties

Plaintiff asks leave to add various defendants: Donald Schupak & Company, Inc., Samurai Restaurant Corporation, Rudy's Restaurant Group, Horn & Hardart, Inc., Maxwell's of San Francisco, and Bright Star Holding Inc. Her theory is that these firms were either alter egos of Maxwell's or successor employers. But since she has settled with her employer, she cannot assert the claim she had against others standing in its shoes. The request will therefore be denied.

Conclusion

As the foregoing discussion shows, it will be difficult for plaintiff to state claims against individual defendants. To do so, she must comply with the rules set forth in this order. If plaintiff believes that she has facts sufficient to state a claim against a particular defendant, she should state them briefly and concisely, without argument; each claim should be stated separately conforming to the outline of this order. She should not elaborate all of the detailed evidence she might have. Nor is she to quote from cases or other authorities or argue the law in her amended complaint. Plaintiff must also recognize that her damages (except under the emotional distress claim) will be limited to lost back pay, reduced by the amount she received in the settlement.

For the reasons stated, the motion to dismiss is granted with leave to file an amended complaint complying with this order on or before February 2, 1990.

IT IS SO ORDERED.

DATED: January 17, 1990

/s/
WILLIAM W. SCHWARZER
United States District Judge

APPENDIX I

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA GRANTING EX PARTE APPLICATION FOR EXTENSION OF TIME

JUNE 6, 1990

PHYLLIS MILLER
6440 Wornall Road
Kansas City, Missouri 64113
Telephone: (816) 333-9666

Plaintiff, Pro Se

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PHYLLIS MILLER,	§	
Plaintiff,	§	No. C-87-1906-VRW
v.	§	EX-PARTE
DINO LA ROSA, et al.,	§	APPLICATION AND
Defendants.	§	ORDER

JUNE 4, 1990 EX-PARTE APPLICATION FOR EXTENSION OF TIME IN ORDER TO FILE MOTION TO RECONSIDER "ORDER" FILED MAY 23, 1990

Plaintiff, Phyllis Miller asks for an extension of time for the following reasons

I. Plaintiff is not at her normal place of residence in Kansas City, Missouri, due to a family emergency.

II. All of Plaintiff's evidence, research, and legal filings were shipped back to Kansas City.

III. Copies of "the Order" were sent to Plaintiff's son in California for him to forward to her. He did not receive "the Order" because of the long holiday weekend until May 29, 1990. Plaintiff did not receive the Order to read until May 30, 1990.

IV. Plaintiff's daughter had moved to Baltimore, Maryland earlier this year to be married to her fiance and friend of five years. Late April, 1990 he said never mind he had changed his

mind. Her (the daughter's) brother found me the plaintiff in California and via a three-way conversation plaintiff tried to calm a young girl's emotional devastation. The daughter was not only heart-broken, but was in a strange city with *no* friends or relatives, *no* where else to go to live, and only a small amount of money. She had spent most of her money moving and on Christmas gifts for the man she thought she was to marry. Plaintiff talked to her daughter for about five days by phone long distance. The daughter was not able to eat, was throwing up, and was getting into a deeper depression each day. Plaintiff talked to her daughter for over an hour after the daughter said in a whisper, "Mom I'm not going to make it". Plaintiff sent legal papers back to Kansas City and flew to Baltimore Maryland May 2, 1990. Plaintiff has spent 3 1/2 weeks of taking care of her daughter and staying with her to help her get better and then and now to help her move back to Kansas City. The daughter had lost ten pounds in a week. She is better, but not completely okay yet. Plaintiff is afraid to leave her yet. Plaintiff is allowing two weeks time to pack and ship all of her daughters' antiques and possessions and then time to slowly drive with the daughter in her older model car to journey back to Kansas City.

V. Plaintiff believes that with in five to seven days she would be able to file her motion after returning to Kansas City. Plaintiff

therefore requests an extension until and including June 25, 1990. Motion to be due June 26, 1990.

Respectfully,

Phyllis Miller, Pro Se
June 4, 1990

GRANTED extension to June 26, 1990

/s/
VAUGHN R. WALKER
US DISTRICT COURT JUDGE

6/6/90
UNITED STATES DISTRICT COURT

APPENDIX J

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

AUGUST 14, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PHYLLIS MILLER,	§	
Plaintiff,	§	
v.	§	No. C-87-1906-VRW
DINO LA ROSA, et al.,	§	
Defendants.	§	

ORDER

On May 18, 1990, the court dismissed this action in its entirety, and judgment was entered for the defendants. On June 5, 1990, the court granted plaintiff's ex parte application for an extension of time to file a motion for reconsideration. Plaintiff was given until June 26, 1990 to file such a motion.

Plaintiff filed a motion for reconsideration or, in the alternative, for leave to file a fourth amended complaint, on June 27, 1990. It appears that plaintiff mailed the papers to the court from Kansas City on June 25, 1990 and thus did not leave enough time for the motion to be filed by the June 26 deadline. Plaintiff filed another motion to reconsider on July 5, 1990. Although plaintiff did not so specify, the court deems these motions to have been made pursuant to Fed. R. Civ. P. 59(e).

If this court refuses to rule on plaintiff's motion, she will have lost her ability to appeal the May 18 judgment to the Court of Appeals. An appeal must be made within 30 days of the entry of judgment in the district court. Fed. R. App. P. 4(a)(1). This period expired on June 18, 1990. If a timely motion under Fed. R. Civ. P. 59 to alter or amend the judgment is filed, the 30-day period runs from the disposition of such motion. Fed. R. App. P. 4(a)(4). However, plaintiff's Rule 59 motions were untimely, as discussed above.

Nevertheless, so that plaintiff's right to appeal is not unduly prejudiced by her failure to meet a filing deadline by one day, the court will rule on the motions for reconsideration. If plaintiff wishes to appeal the May 18 judgment to the Court of Appeals,

she has 30 days from the date of this order to file a notice of appeal pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

For the reasons stated in the court's order filed May 18, 1990, plaintiff's motion for reconsideration filed June 27, 1990 is DENIED. Plaintiff's motion filed July 5, 1990 is DENIED as untimely.

DATED: August 14, 1990

/s/

VAUGHN R. WALKER

United States District Judge

Supreme Court, U.S.
FILED
NOV 24 1993
OFFICE OF THE CLERK

No. 93-659

IN THE

Supreme Court of the United States

October Term 1993

PHYLLIS MILLER,

Petitioner,

v.

DINO LA ROSA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ORGANIZATION FOR WOMEN, AMERICAN ASSOCIATION OF RETIRED PERSONS, NOW LEGAL DEFENSE & EDUCATION FUND, FEDERALLY EMPLOYED WOMEN, FEMINIST MAJORITY FOUNDATION, JAPANESE AMERICAN CITIZENS LEAGUE, NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, AND YWCA OF THE USA IN SUPPORT OF PETITION FOR CERTIORARI

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November 24, 1993

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IN THE

Supreme Court of the United States

October Term 1993

PHYLLIS MILLER,

Petitioner,

v.

DINO LA ROSA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ORGANIZATION FOR WOMEN, AMERICAN ASSOCIATION OF RETIRED PERSONS, NOW LEGAL DEFENSE & EDUCATION FUND, FEDERALLY EMPLOYED WOMEN, FEMINIST MAJORITY FOUNDATION, JAPANESE AMERICAN CITIZENS LEAGUE, NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, AND YWCA OF THE USA IN SUPPORT OF PETITION FOR CERTIORARI

The National Organization for Women ("NOW"), the American Association of Retired Persons ("AARP") and other *amici* herein respectfully pray that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 19, 1993.[1]

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[1] Written consents by counsel for petitioner and respondents to the filing of the brief have been filed with the Clerk's office.

INTERESTS OF THE AMICI CURIAE

NOW is the nation's largest feminist organization devoted to the advancement of women's rights, with over 280,000 members and more than 700 chapters in all 50 states and the District of Columbia. Since its inception, NOW has supported and worked toward full equal employment opportunity for women, including the elimination of sexual harassment and other discrimination in the workplace.

The AARP is a non-profit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of the AARP's thirty-four million members are employed, most of whom are protected by Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. One of the AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices and policies regarding work and retirement. In pursuit of this objective, the AARP has participated as *amicus curiae* in numerous discrimination cases before this Court and the federal courts of appeals.

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was formed in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, such as sexual harassment. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting sexual harassment, including *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal pending*, and *Townsend v. Indiana University*, 995 F.2d 691 (7th Cir. 1993).

Founded in 1987, the Feminist Majority Foundation ("FMF") is a non-profit, national organization with officers in Arlington, Virginia and Los Angeles, California. The primary goal of FMF

is the empowerment of women. FMF believes that employers as well as their agents must be held accountable for employment discrimination under Title VII and the Age Discrimination in Employment Act. The exclusion of supervisors, managers, and other agents of an employer as defendants in employment discrimination cases would severely undermine enforcement of anti-discrimination statutes and the rights of women workers.

Federally Employed Women, Inc. ("FEW") is an international non-profit organization representing over one million civilian and military women employed by the federal government. Since its inception in 1968, FEW's primary objective has been to eliminate sex discrimination and enhance career opportunities for women in government. Recognizing that sexual harassment is the most blatant form of sex discrimination, FEW has vigorously pursued activities designed to educate workers on the issue, extend protection and relief to victims of harassment, and ensure that employers and employees are held responsible for illegal acts.

As the "Voice of Working Women" for 75 years, the National Federation of Business and Professional Women's Clubs, Inc. of the United States of America ("BPW/USA") has taken steps to end sexual harassment in the workplace. BPW/USA's 80,000 members in 2800 Local Organizations across the United States, including the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, have sought economic equity for working women through education and advocacy.

The Japanese American Citizens League ("JACL") is the largest Asian American civil and human rights organization in the United States. Established as a non-profit organization in 1929, JACL has participated, either as a party or as *amicus curiae*, in various legal actions which have challenged racial discrimination against Asian Americans. One of JACL's primary missions is to secure equal opportunity for Asian Americans and to fight discrimination in all forms.

Celebrating its 135th year, the YWCA of the USA provides services to over 12 million women and girls and their families in 400 community and student associations operating at over 4000 locations throughout the 50 states. The mission of the YWCA is the empowerment of women and the elimination of racism. Employment discrimination therefore has been a major focus of our advocacy.

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit in this case, if left standing, would undermine two key civil rights statutes: Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act ("ADEA"). At present, it is common for victims of employment discrimination to sue not only their actual employer but also those individuals — supervisors, managers, or other agents of the employer — who committed the discriminatory acts in question. Proceeding against these perpetrators makes sense: these are the very people who engaged in the wrongful conduct. Moreover, in cases where the employer is bankrupt or otherwise judgment proof, or has a legal defense to liability, proceeding against the individuals can be the victim's only chance to recover.

Astonishingly, the Ninth Circuit has now held that Title VII and the ADEA — and, by implication, the Americans with Disabilities Act ("ADA") as well[2] — afford no relief against the people who actually engage in discriminatory conduct. Under the Ninth Circuit's decision, *only* actual employers, and not the responsible individuals, may be held liable.

The Ninth Circuit's decision turns the traditional notion of personal liability for wrongful acts on its head. If a supervisor slanders an employee, steals money from the employee's wallet, or

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[2] The key definitions in the ADA are essentially identical to those in the ADEA and Title VII. *See, e.g.*, 42 U.S.C. § 12112(5)(A) (defining "employer" to include any agent of an actual employer).

knocks the employee on the head, it goes without saying that the supervisor may be held personally liable for those wrongs. The only question is whether the supervisor's employer may also be held liable. Yet, under the Ninth Circuit's decision, if that same supervisor dismisses an employee because of the employee's race, withholds money from the employee's paycheck because of the employee's age, or sexually assaults the employee, the employer may be held liable under Title VII or the ADEA, but the supervisor cannot be.

The practical effects of the Ninth Circuit's decision could be enormous. In fiscal 1993, more than 9,000 employment discrimination charges were filed with the Equal Employment Opportunity Commission ("EEOC") in the Ninth Circuit alone.[3] Each of these charges could result in litigation affected by the Ninth Circuit's holding. Moreover, the Ninth Circuit's decision could have repercussions nationwide. Prior to the decision, seven circuits had held that an agent of an employer may be named as a defendant in a Title VII or ADEA case,[4] while *no* circuit had rejected that seemingly obvious proposition. Now, the issue is in doubt.[5]

The Ninth Circuit's holding will leave victims of discrimination uncompensated and will undermine efforts to prevent discrimi-

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[3] This figure reflects the number of charges received during fiscal 1993 by the EEOC offices in California, Washington and Hawaii. *See* FY93 Charge Receipts - Distribution in Four Districts (EEOC 1993) (on file with counsel).

[4] *See* Petition for a Writ of Certiorari at 15-18; *Jones v. Wesco Invs. Inc.*, 846 F.2d 1154, 1156-57 (8th Cir. 1988); *see also Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134 (2d Cir. 1993) (affirming finding of Title VII liability against employer and agents); *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993) (public employees could be named as defendants in their official capacities).

[5] In the Northern District of Illinois, for instance, judges have both followed and rejected the Ninth Circuit's holding in recent months. *Compare, e.g., Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769 (N.D. Ill. 1993) (rejecting Ninth Circuit decision) *with Pelech v. Klaff-Joss, L.P.*, 828 F. Supp. 525 (N.D. Ill. 1993) (following Ninth Circuit decision)

nation in the first place. Further, the court's decision is both inconsistent with the language enacted by Congress and unsupported by the legislative history. This Court should grant *certiorari* and reverse.

I. THE NINTH CIRCUIT'S DECISION WILL UNDERMINE THE DETERRENT AND PUNITIVE EFFECT OF THE FEDERAL EMPLOYMENT DISCRIMINATION LAWS

Two years ago, Congress strengthened Title VII by enacting the Civil Rights Act of 1991 (the "1991 Act"), which provided for limited compensatory and punitive damages in Title VII cases.[6] In explaining the need for the 1991 Act, the House Education and Labor Committee quoted the testimony of Ellen Vargyas of the National Women's Law Center:

> "Who should bear the non-wage costs of intentional, illegal discrimination: the perpetrator of the discrimination or the victim?" Under current Title VII law, it is the victim.

H.R. REP. No. 40(I), 102d Cong., 1st Sess. 66 (1991). The implication was clear: the 1991 Act was needed so that perpetrators, not victims, would bear the cost of discrimination. "As Dr. Heidi Hartmann, an economist, testified before the Committee, 'if discrimination costs money, people will stop doing it.'" *Id.* at 69.

The Senate Committee on Labor and Human Resources also recognized that compensatory and punitive damages were necessary to penalize those who discriminate. In its report on an earlier version of the 1991 Act, the committee quoted remarks by then-Judge Clarence Thomas, former Chair of the EEOC:

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[6] The ADEA already provided for double damages in cases of willful violations. *See* 29 U.S.C. §§ 626(b), 216(b); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125-26 (1985).

> While we can provide backpay and reinstatement to employees who have been wrongfully denied equal job opportunities, we cannot penalize those who discriminate. . . . [I]t is a disgrace that the penalty for tampering with a mailbox is greater than the penalty for discriminating.

Clarence Thomas, Discrimination and Its Effects, Speech Before the New Coalition (August 17, 1983), *quoted in* S. REP. No. 315, 101st Cong., 2d Sess. 32 (1990).

The Ninth Circuit's decision undermines the punitive and deterrent goals of the 1991 Act by making it impossible for people who engage in discrimination to be held legally accountable for their acts. Under the Ninth Circuit's decision, perpetrators will *not* bear the cost of discrimination. For these individuals, the penalty for tampering with a mailbox will once again be greater than the penalty for discriminating.

A. The Ninth Circuit's Decision Will Prevent Culpable Parties From Being Punished.

When Title VII was enacted, it was common for employers to have official policies condoning, or even mandating, discrimination on the basis of race, sex or other impermissible characteristics. Today, few employers have such official policies. Instead, most employment discrimination cases involve *ad hoc* acts of discrimination by particular supervisors or managers within the company. The company may properly be held accountable for such acts, but the specific people who commit the discriminatory acts are the truly culpable parties — the ones who most deserve to pay the costs of discrimination. Yet under the Ninth Circuit's decision, these perpetrators cannot be held liable under Title VII or the ADEA, no matter how outrageous their conduct.

The following cases are representative of lawsuits in which victims of intentional discrimination have asserted Title VII or ADEA claims against individual defendants — claims which would be barred under the Ninth Circuit's decision.

In *Stockett v. Tolin*, 791 F. Supp. 1536 (S.D. Fla. 1992), the district court found that the plaintiff, Michelle Stockett, had been sexually harassed by the head of her company, Frank Tolin, on numerous occasions spanning more than a year. For instance:

> On [one] occasion, . . . Tolin came up behind [Stockett], stuck his tongue in her ear and told her in the crudest terms that he wanted to perform oral sex on her. Stockett testified further that [on another occasion], the Defendant again approached her from behind, . . . stuck his tongue in her ear, and said with a four letter expletive that he wanted to have sexual intercourse with Plaintiff. On still other occasions, Stockett testified that . . . the Defendant would corner her, run his fingers up the front of her shirt, grab her breasts and pinch her nipples. During these assaults, he laughed and said, "You like that, don't you." Stockett testified that incidents such as these occurred weekly throughout [her] employment.
>
> * * *
>
> One night . . . Tolin pushed her up against the wall and began licking her neck. According to Plaintiff, Tolin said he "wanted to f--- me." . . . Stockett testified that she was terrified. . . . According to [a witness who interrupted the incident], Stockett had tears in her eyes and from the look in Stockett's eyes and on her face, it was apparent that Stockett was afraid.
>
> * * *
>
> [Shortly before Stockett left the job], she encountered Tolin in a hallway. Tolin . . . asked how long she had been working there. When she replied that she had worked there for about one and one-half years, Tolin said to her, "you've always got an excuse, I want to f--- you." . . . Stockett told Tolin that she worked hard at her job and asked him to leave her alone. Tolin

> responded with a torrent of sexually explicit comments that included, "Oh, you work hard. Do you f--- hard?" [He] finally demanded, "F--- me or you're fired."

Id. at 1542-43.

As the district court concluded, Tolin "blatantly and repeatedly harassed Plaintiff and many other women who worked for him. His conduct included both constant sexually explicit, degrading, and vulgar language and repeated acts of physical abuse. His offensive sexual behavior was relentless, and can only be characterized as crossing all bounds of common decency." *Id.* at 1553. The court held Tolin personally liable for this outrageous conduct. *Id.* at 1554. It awarded back and front pay against him and his business, and held them both liable for attorneys' fees. *Id.* at 1560-61.

In another sexual harassment case, *Jones v. Wesco Investments Inc.*, 846 F.2d 1154 (8th Cir. 1988), the Eighth Circuit affirmed the district court's judgment in favor of the plaintiff, Judith Jones, against her employer, Wesco, and its president, Ben Rose. As the court noted:

> From the beginning of her tenure with Wesco, Ms. Jones was barraged with repeated sexual advances, request[s] for sexual favors, and other verbal or physical contact of a sexual nature. For instance, Ben Rose would come up behind Ms. Jones and rub his hands up and down the sides of her body, touching her breasts. He would pinch her, pat her on the bottom and kiss her on the top of her head. At one point, Rose even put his hand up Ms. Jones' dress. . . . His oral comments included a statement that someday her breasts would be his. On one occasion, Ben Rose . . . informed Ms. Jones that he thought it a good idea that Ms. Jones spend more time in the kitchen area where it was cool because he could see her nipples much better in the cool temperature.

Id. at 1155.

The district court held Rose personally liable under Title VII for his acts of harassment, and the Eighth Circuit concluded that "the district court's decision is fully supported by the facts and law. Indeed, any other result would have been a miscarriage of justice." *Id.* at 1156-57.

In *Madden v. Independence Bank*, 771 F. Supp. 1506, 771 F. Supp. 1510, 771 F. Supp. 1514 (C.D. Cal. 1991), five former employees of the defendant bank brought ADEA claims against the bank and its president, Fulvio Dobrich. The plaintiffs alleged that they had been fired because Dobrich "wanted to eliminate certain workers over forty years of age who did not fit his idea of the bank's corporate image." *Id.* at 1507, 1511. In denying defendants' motion for summary judgment against four of the plaintiffs, the district court noted that there was substantial evidence that Dobrich had acted with discriminatory intent:

> For example, Dobrich referred to an over-forty employee as too old, and not fitting the image of the bank; he called a sixty-year old female employee an "old f--cking bitch": he made references to the bank as being "full of old people"; and he once taunted an over-forty year-old employee stating that there was a young lady in the bank who was dying to have her job.

Id. at 1508; *see also id.* at 1518. Dobrich claimed that the plaintiffs had been fired as part of a staff reduction needed to cut expenses. But one of the bank's own managers "stated in his deposition that he understood the job elimination scheme to be a ruse, and that the real purpose was to get rid of older employees." *Id.* at 1509; *see also id.* at 1518.

Cases such as these graphically illustrate the importance of individual liability under the civil rights laws. In such cases, the perpetrators of discrimination roundly deserve to be punished for their wrongful conduct. But under the Ninth Circuit's decision, the Title VII and ADEA claims against the individual defendants could

not have gone forward in any of these cases. Even where individual defendants are found to have committed repeated acts of intentional discrimination, as in *Jones* and *Stockett*, federal law would provide no sanction.[7]

B. The Ninth Circuit's Decision Will Undermine Title VII and ADEA Enforcement.

It seems obvious that eliminating the threat of personal liability would reduce the incentive for supervisors and other employees to comply with the employment discrimination laws. Indeed, the Fifth Circuit has concluded that eliminating individual liability "would encourage supervisory personnel to believe that they may violate Title VII with impunity." *Hamilton v. Rodgers*, 791 F.2d 439, 443 (5th Cir. 1986). But the Ninth Circuit termed this reasoning "unsound," suggesting that employees will behave themselves even if they do not face direct liability because of the threat of discipline by their employers. As the court put it:

> No employer will allow supervisory or other personnel to violate Title VII when the employer is liable for the . . . violation. An employer that has incurred civil damages because one of its employees believes he can violate Title VII with impunity will quickly correct that employee's erroneous belief.

Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 588 (9th Cir. 1993). Thus, the Ninth Circuit concluded that individual liability is not necessary to deter Title VII and ADEA violations.

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[7] Depending on the jurisdiction and the facts of the case, some relief might be available under state law. *See, e.g., Stockett*, 791 F. Supp. at 1560-61 (awarding damages under Florida law). But even in such cases, the individual defendants could not be subject to the special remedies afforded by federal law, such as attorneys' fees.

The Ninth Circuit erred. It ascribed far more power to employers than they really have, and too little power to the threat of personal liability.

First, an employer is not always free to take effective remedial action against employees who violate employment discrimination laws. For instance, in *Chrysler Motors Corp. v. International Union, Allied Industrial Workers*, 959 F.2d 685 (7th Cir.), *cert. denied*, 113 S. Ct. 304 (1992), the Seventh Circuit upheld an arbitrator's reinstatement of a forklift operator who had been fired for sexually assaulting a co-worker. The facts were undisputed: during a phone conversation, the operator "put down the telephone receiver and approached the co-worker from behind and grabbed her breasts . . . . He then returned to the telephone and stated, 'Yup, they're real.'" *Id.* at 686 n.1. To support its decision to fire the operator, Chrysler presented evidence that the operator had also grabbed or pinched female co-workers on four other occasions. Nevertheless, the arbitrator held that the operator had not been dismissed for good cause and directed Chrysler to reinstate him with back pay. *Id. See also Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 574 (10th Cir. 1990) (demotion of a corrections officer who had sexually harassed two women was reversed by a state personnel board); *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1989) (ordering reinstatement of employee who had been fired by Internal Revenue Service for harassing two female IRS employees).[8]

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[8] Even if the employer ultimately prevails in such cases, the mere threat of a protracted legal battle may reduce the employer's incentive to take firm action against offending employees. *See, e.g., Garziano v. E.I. du Pont de Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987) (employee fired for sexual harassment won $93,000 defamation verdict against employer; reversed on appeal); *Agugliaro v. Brooks Bros., Inc.*, 802 F. Supp. 956 (S.D.N.Y. 1992) (employee purportedly fired for sexually harassing a subordinate sued former employer, claiming that he was actually terminated because of his age and gender).

Second, the Ninth Circuit wrongly assumed that when "supervisory or other personnel" commit acts of discrimination, there will always be a superior with authority to set the employee straight. In many cases, however, the perpetrator in question is also a high-level manager of the company. *See supra* pp. 8-10 (discussing cases of egregious, intentional discrimination by top managers). Such an employee may face no realistic prospect of being disciplined by the company for his or her wrongful acts.

Third, the Ninth Circuit understates the likely deterrent effect of personal liability. To be sure, the threat of discipline by one's employer may help to deter some civil rights violations. But just as surely, the threat of such discipline *coupled with the threat of personal liability* would be an even greater deterrent. If one has to worry about losing one's job *and* paying the fine, that is twice the reason to avoid the illegal conduct. By contrast, the incentive to obey the law is diminished when someone else will be paying the fine. *Cf. Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 165, 133 N.E. 432, 433 (1921) (Cardozo, J.) (noting that wrongdoer, not insurance company, must bear the cost of intentional wrongful conduct because of "the fundamental principle that no one shall be permitted to take advantage of his own wrong").

II. THE NINTH CIRCUIT'S DECISION WILL LEAVE MANY VICTIMS OF DISCRIMINATION WITHOUT A REMEDY

The Ninth Circuit's conclusion that employer liability is sufficient to deter discrimination is also wrong for another reason: in many cases, there is no employer that can be held liable. In these cases, the Ninth Circuit's holding will not only undermine the deterrence of employment discrimination, but will leave victims without a remedy as well.

A. Many Victims of Sexual Harassment Will Be Left Uncompensated.

This Court recently reaffirmed that sexual harassment which creates a hostile or abusive work environment is actionable under

Title VII. *Harris v. Forklift Systems, Inc.*, 61 U.S.L.W. 4004 (U.S. Nov. 9, 1993). Yet the Ninth Circuit's decision would leave many victims of such harassment with no Title VII remedy. Having been foreclosed by previous decisions from suing their employers for such harassment, these victims would now be precluded from suing the actual perpetrators of discrimination as well.

This Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), made clear that not all victims of sexual harassment have a remedy against their employer. In *Vinson*, this Court "decline[d] the parties' invitation to issue a definitive rule on employer liability," but expressly held that "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.* at 72. Since *Vinson*, courts in numerous cases have declined to impose liability on employers for sexual harassment by co-workers — even where such acts were pervasive enough to amount to a term or condition of employment and would not have taken place but for the employment relationship. *See, e.g., Hirschfeld*, 916 F.2d at 576-80; *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463 (7th Cir. 1990); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1315-17 (11th Cir. 1989). Similarly, the EEOC's current policy guidance on sexual harassment suggests that if employers have a "strong policy against sexual harassment" and maintain an "effective complaint procedure," they may escape liability even in clear cases of harassment. *See* EEOC Policy Guidance on Current Issues of Sexual Harassment (Mar. 19, 1990), *reprinted in* BNA DAILY LABOR REPORT, Mar. 28, 1990, at E-1.

Where the employer cannot be held liable, an action against the perpetrator may be the victim's only remedy. In *Steele*, for instance, plaintiff Mary Steele sued both the perpetrator and her corporate employer for sexual harassment. The district court found that the perpetrator had "violated Title VII by creating a hostile working environment," and ordered him to pay attorney fees of $16,650. But the court also found that Steele's "corporate employer was not liable for the hostile environment because it took

prompt remedial action" after it learned about the harassment. *Id.* at 1314. The court also rejected Steele's claim under Florida law against both her employer and the perpetrator. *Id.* at 1315. Thus, Steele's *only* recovery was under Title VII against the perpetrator — a claim which would have been barred under the Ninth Circuit's decision.

B. Employees of Bankrupt or Judgment Proof Employers Will Be Left Uncompensated.

Victims of sexual harassment are not the only ones who could be left without a remedy if the Ninth Circuit's decision remains in force. Victims of any form of discrimination barred by Title VII or the ADEA would be unable to recover back pay, damages, or other monetary relief in cases where the victim's employer is bankrupt, out of business or otherwise judgment proof. As one court recently noted:

> [T]here are cases . . . in which the defendant company goes bankrupt and the plaintiff is forced to seek recovery from the supervisory employees who committed the discriminatory acts. [I]f the people who make discriminatory decisions do not have to pay for them . . . the victim may receive no compensation whatsoever.

Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 786 (N.D. Ill. 1993).

Petitioner Miller's own case is an excellent example. Because the company Miller worked for filed for bankruptcy, Miller will not be able to obtain full relief for her alleged injuries if the Ninth Circuit's decision is allowed to stand. Her only chance for a complete recovery was to sue her supervisors directly. Now, the Ninth Circuit has blocked that avenue of relief as well.

III. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTES AND IS UNSUPPORTED BY THE LEGISLATIVE HISTORY

As Petitioner Miller has explained, *see* Petition at 11-15, the Ninth Circuit's decision is inconsistent with the plain language of both Title VII and the ADEA, both of which expressly provide that the term "employer" includes any agent of the employer. Indeed, the Ninth Circuit made no serious attempt to reconcile its holding with the actual language of the statutes. It effectively ignored the statutory language in favor of its guess as to what Congress must have intended to do. *See Miller*, 991 F.2d at 587-88.

Of course, the best indication of what Congress intended to do is what it actually did. Under both statutes, "employers" are liable for violations and "employers" include not just actual employers, but agents of employers as well. Thus, a straightforward reading of each statute compels the conclusion that agents of employers may be held liable under both Title VII and the ADEA.

Moreover, certain exceptions included within Title VII's definition of "employer" appear to have been carefully drafted on the understanding that agents of an employer are subject to liability. Under Title VII as originally enacted, "employer" is defined to mean

> a person engaged in an industry affecting commerce who has twenty-five or more employees . . . *and any agent of such a person* . . . Provided, that during the first year after the effective date . . . persons having fewer than one hundred employees *(and their agents)* shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees *(and their agents)* shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees *(and their agents)* shall not be considered employers.

Pub. L. 88-352, § 701, 78 Stat. 253 (1964) (emphasis added). Likewise, when Congress amended Title VII in 1972 to lower the threshold number of employees to 15, it provided a one-year exception for both employers with fewer than 25 employees *"and their agents."* Pub. L. 92-261, § 2, 86 Stat. 103 (1972), *codified at* 42 U.S.C. § 2000e(b).

Thus, each time Congress exempted an employer from liability under Title VII on the basis of size, it expressly excluded the employer's agents as well. If the inclusion of the term "agent" in the definition of employer had been meant only to provide for *respondeat superior* liability, as the Ninth Circuit believed, *see Miller*, 991 F.2d at 587, these exclusions would not have been necessary.

Nor does the legislative history support the Ninth Circuit's interpretation. The Ninth Circuit found it "inconceivable" that Congress could have intended to exempt small employers from Title VII and the ADEA, yet leave individual employees subject to liability. *Id.* But the legislative record suggests that this is precisely what Congress had in mind: members were concerned with *small businesses*, not individual employees, largely because of the personal nature of such enterprises.

For instance, Senator Humphrey, a leading proponent of Title VII, commented on the small employer exemption during Senate debate in 1964:

> A large number of small businesses in America . . . employ fewer than 25 persons. When they get above 25 . . . [they] lose most of whatever intimate, personal character they might have had.

110 CONG. REC. 13088 (June 9, 1964) (remarks of Sen. Humphrey). Several years later, in debate over lowering the minimum number of employees from 25 to 8, critics of the measure (who succeeded in raising the new minimum to 15) also focused on the unique nature of small businesses, many of which are family-run. *See, e.g.*, SUBCOMMITTEE ON LABOR, SENATE COMMITTEE ON

LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 1298 (Comm. Print 1972) (remarks of Sen. Fannin) (many minority small businesses "are in effect an extension and an intensification of the heritage of these people"); *id.* at 1010 (remarks of Sen. Cotton) (hiring of an employee by a small business is an "intensely personal act . . . almost like selecting a partner"); *id.* at 1375 (remarks of Sen. Ervin) (referring to special relationship between small business operator and employees).

Comments such as these make clear that the Title VII exemptions for small businesses were intended to address concerns peculiar to such entities — and that the Ninth Circuit erred in assuming that Congress also meant to exempt individual employees of larger entities.[9] We have found nothing in the legislative history of Title VII or the ADEA to suggest that Congress intended to exclude individual employees from the reach of either statute.

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[9] Of course, individual employees of *small* businesses are exempt from coverage under the small business exemption since they are not agents of an "employer" as defined in Title VII and the ADEA.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be granted and the decision of the Court of Appeals for the Ninth Circuit should be reversed.

November 24, 1993

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IN THE

Supreme Court of the United States

October Term 1993

PHYLLIS MILLER,

Petitioner,

v.

DINO LA ROSA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL COALITION FOR UNIVERSITIES IN THE PUBLIC INTEREST, MOISES VAZQUEZ, ARMANDO DURON, THE ACLU FOUNDATION OF SOUTHERN CALIFORNIA AND THE CALIFORNIA IMMIGRANT WORKERS' ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

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The National Coalition for Universities in the Public Interest ("NCUPI"), Moises Vazquez, Armando Duron, the ACLU of Southern California and the California Immigrant Workers' Association, respectfully pray that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 19, 1993.[1]

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[1] Written consents from counsel for petitioner and respondents to the filing of the brief have been filed with the Clerk's office.

INTERESTS OF THE AMICI CURIAE

NCUPI is a non-profit organization founded by Ralph Nader and Professor David Noble in 1983. NCUPI supports the educational mission of universities nationally, and seeks to protect faculty from fraud, misconduct and discrimination in employment. NCUPI, Moises Vazquez, Armando Duron, the ACLU Foundation of Southern California, and the California Immigrant Workers' Association currently represent Dr. Rodolfo F. Acuña, an employment discrimination plaintiff in the State of California who has sued the Regents of the University of California, the University of California at Santa Barbara and the individual administrators and professors who reviewed and denied his application for employment as a Professor of Chicano Studies. Dr. Acuña alleges that defendants' denial was impermissibly based on his race, national origin, age and political views in violation of both federal and state employment discrimination law.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision in *Miller v. Maxwell's International Inc. et al.*, 991 F.2d 583 (9th Cir. 1993) ignores the plain meaning of the definitions of both "person" and "employer" in both Title VII and the ADEA and guts the legislative intent of both civil rights statutes. It also disregards its own doctrine that Title VII and the ADEA be liberally construed to effect their remedial purposes; disregards the Code of Federal Regulations' provision that Title VII be liberally contrued to effect its purpose; flys in the face of the 1972 Amendments to the Civil Rights Act of 1964, which extended remedies to public employees and to educational institutions; and ignores the Civil Rights Act of 1991, which seeks to strengthen remedies for employment discrimination.

Under the court's decision in *Miller v. Maxwell's Int'l Inc. et al.*, victims of discrimination are prohibited, *ab initio*, from suing those individuals who were involved in the discriminatory acts. Petitioner Miller was barred from seeking any remedy from the individual supervisors and co-workers who discriminated against her.

The court's decision in *Miller v. Maxwell's Int'l Inc. et al.*, creates separate and unequal remedies under Title VII. This Court should grant petitioner's writ for certiorari and reverse the decision of the Ninth Circuit in *Miller v. Maxwell's Int'l Inc. et al.*

I. THE NINTH CIRCUIT'S DECISION UNDERMINES THE ENFORCEMENT OF TITLE VII AND THE ADEA IN THE NINTH CIRCUIT

The Ninth Circuit's decision in *Miller* forecloses relief against an entire class of defendants in the largest Federal circuit in the nation. As that decision has been understood by the Federal district courts in the Ninth Circuit, individual supervisory employees can never be held liable in their personal capacities and some courts have held that they cannot be held liable in their official capacities.

In *Coulter v. City of Berkeley*, No. C-92-5062-MHP, 1993 U.S. Dist. LEXIS 10423 (N.D. Cal. July 26, 1993), the plaintiff brought suit against various officers of the Berkeley Police Department alleging that they had discriminated against him on the basis of his race and gender by withholding from him various benefits under the Department's sick leave and vacation leave policy. The court held that under *Miller v. Maxwell's Int'l Inc. et al.* the individual defendants could not be sued in either their individual or official capacities.

Similarly, in *Gauronski v. Busch Properties, Inc.*, CV 93-985-WMB, 1993 U.S. Dist. LEXIS 16254 (C.D. Cal. Oct. 13, 1993), the plaintiff brought suit under Title VII against her former employer and its chief executive officer, chief financial officer, a director and a corporate representative. The court held that the individuals could not be sued in either their individual or official capacities.

Amici represent Dr. Rodolfo Acuña, who is currently seeking remedies from the individual administrators and professors who reviewed and denied his application for employment as a Professor of Chicano Studies. U.S.D.C. for the Central District CV 92-1548 (HLH).

In or about June 1991, Dr. Rodolfo F. Acuña, was denied employment as a full Professor of Chicano Studies at the University of California at Santa Barbara. On September 25, 1992, Dr. Acuña filed suit in the Superior Court of Alameda County alleging that the Regents of the UC and UCSB, the public "corporate entities" as well as those individual administrators and professors who participated in the review and denial of his employment application, had discriminated against him on the basis of his race, national origin, age and political activities and views. Dr. Acuña sought relief under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*; Article I, § 2 of the California State Constitution, and the California Fair Employment and Housing Act, § 12900 *et seq.* Dr. Acuña named the individual defendants because they were the people who discriminated against him. Dr. Acuña's federal action was subsequently transferred to the United States District Court for the Central District (Hupp, Harry L.) and his state action transferred to the Superior Court of Santa Barbara County (Stevens, Ronald C.).

On June 16, 1993, defendants the Regents of the UC, UCSB and individual defendants moved to dismiss Dr. Acuña's federal action. The public corporate entities argued that they were not responsible for the denial of Dr. Acuña's application, while the individual defendants argued that individual defendants could not be sued in their personal capacities under Title VII and the ADEA. Plaintiff Dr. Acuña opposed the motion and contended that the Ninth Circuit's decision conflicted with its own doctrine which permitted suit under Title VII and the ADEA against those individuals who were involved in the discriminatory acts alleged.

On July 12, 1993, the United States District Court for the Central District of California dismissed Dr. Acuña's suit against the individual defendants in their individual capacities, permitting suit against those same individuals only in their official capacities. Thus, Dr. Acuña was not permitted to seek any relief against the individual defendants in their personal capacities.

The Ninth Circuit's reconstruction of the provisions of Title VII and the ADEA guts the legislative intent of both civil rights

statutes and frustrates the amendments of 1972 and the Civil Rights Act of 1991. The decision is contrary to the plain language of both statutes and is not supported by the Ninth Circuit's rationale.

A. Title VII and the ADEA

The legislative intent in the enactment of Title VII of the Civil Rights Act of 1964 was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered ... stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) *citing*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971).

The legislative intent in the enactment of the Age Discrimination in Employment Act in 1967 was "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b); *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991); *EEOC v. Wyoming*, 460 U.S. 227, 231-233 (1983).

B. The 1972 Amendments

In 1972 Congress amended the Civil Rights Act of 1964 to extend the remedies of Title VII to public employees and to educational institutions. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-448 (1976). "The 1972 Amendments retained the right of an individual aggrieved by an employer's unlawful employment practice to sue on his or her own behalf ... and made clear that that right was being extended to persons aggrieved by public employers." *Supra* at 449, n. 2. To effect this purpose, Title VII's statutory definitions of "person," "employer" and "employee" were revised as follows.

The definition of "person" in § 701(a) of Title VII was amended to include "governments, governmental agencies, [and] political subdivisions"; the phrase "a State or political subdivision" was stricken from the definition of "employer" in § 702 (b) and the

definition of "employee" in § 701(f) was amended to include individuals "subject to the civil service laws of a State government, governmental agency or political subdivision." *Id.* Thus, after 1972, Title VII offered remedies to all employees, irrespective of whether they were employed by the private or public sector.

C. Title VII's Statutory Definitions

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e provides the following definitions of "person", "employer" and "employee" for the purposes of this subchapter:

> (a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501 (c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.
>
> (f) The term "employee" means an individual employed by an employer, except that the term "employ-

> ee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

In *Miller v. Maxwell's Int'l Inc. et al.*, the court effectively obliterated the entire section of Title VII which defines the term "person," *as that term must be used* in the term "employer" for the purposes of Title VII. *See*, 42 U.S.C. § 2000e(a). The Ninth Circuit thus unilaterally amended the statutory definitions of "person" and "employer." Indeed, 42 U.S.C. § 2000e (a) provides for sixteen different definitions of "person," only one of which was used by the Ninth Circuit, i.e. the definition of a corporate "person" as "employer." Pursuant to *Miller v. Maxwell's Int'l Inc. et al.*, corporations are the only "person" which meet the statutory definition of "employer." The ultimate result is that the term "employer" is artificially constrained and limited by the Ninth Circuit to be a corporate entity only.

The Ninth Circuit totally ignored the canons of statutory construction, which include at a minimum, giving effect to every word used by Congress. *Reiter v. Sonotone Corp.*, 442 U.S. 331, 339 (1979). "In construing a statute we are obliged to give effect, if possible, to every word Congress used." *Id., citing, United States v. Menasche*, 348 U.S. 528, 538-539 (1955). Certainly, it was possible for the Ninth Circuit to give effect to all relevant definitions provided in the term "person", including the definition "one or more individuals."

The Ninth Circuit also ignored its own doctrine which permits suit of those individuals who were involved in the discriminatory acts giving rise to the employment discrimination suit. *Sosa v. Hiraoka*, 920 F.2d 1451, 1458-1459 (9th Cir. 1990);

see also, Chung v. Pomona Valley Community Hospital, 667 F. 2d 788 (9th Cir. 1982).

Petitioner Miller who worked for Maxwell International Inc., a private employer, was allowed to sue the private corporate entity which employed her, but was prohibited from suing those individuals who were involved in the discriminatory acts, her supervisors and co-workers.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be granted and the decision of the Court of Appeals for the Ninth Circuit should be reversed.

November 26, 1993

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No. 93-659

In The

Supreme Court of the United States

October Term 1993

PHYLLIS MILLER,

Petitioner,

v.

DINO LA ROSA, et al.,

Respondents.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

January 5, 1994

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QUESTIONS PRESENTED

Did the court of appeals have jurisdiction to entertain petitioner's appeal when there was no timely notice of appeal, no timely Rule 59 motion to extend the appellate filing deadline, and no statement or representation made by the district court which specifically misled petitioner that her appeal had been perfected?

Did the court of appeals correctly conclude, pursuant to the express language of the statute, that the proper defendant in a Title VII case is *the employer*, rather than the alleged victim's co-workers or supervisors?

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JURISDICTION

While respondents do not question the jurisdictional authority cited in the petition, they do wish to point out, and emphasize, that the court of appeals did not have proper jurisdiction to consider petitioner's appeal. Thus, while this Court has jurisdiction to consider the petition, the Court's proper role is limited to correcting the jurisdictional error of the court below. See, e.g., *Bender v. Williamsport Area School District*, 475 US 534, 541, *rehearing denied*, 476 US 1132 (1986).

STATUTORY PROVISIONS AND RULES INVOLVED

Rule 59 (b), (e) of the Federal Rules of Civil Procedure:

(b) A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(e) A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 6 (b) of the Federal Rules of Civil Procedure:

(b) When by these rules . . . an act is required or allowed to be done at or within a specified time, the court . . . may not extend the time for taking any action under Rules 50 (b), and (c)(2), 52 (b), 59 (b) and (e), 60 (b), and 74 (a), except to the extent and under conditions stated in them.

Rule 3 (a) of the Federal Rules of Appellate Procedure:

(a) An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing

a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 USC § 1292 (b) and appeals in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

Rule 4 (a) (1) and (4) of the Federal Rules of Appellate Procedure:

(a) (1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or other order appealed from. . . .

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: . . . (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. . . .

Title VII (in addition to the provisions cited in the petition) (emphasis added by Respondents):

42 USC § 2000e-5 (b):

When a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an *employer,*

employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining . . . has engaged in an unlawful employment practice. . . . the [Equal Employment Opportunity] Commission shall serve a notice of the charge (including the date, place, and circumstances of the alleged unlawful employment practice) on such *employer, employment agency, labor organization, or joint labor-management committee* (hereinafter referred to as *the "respondent"*) within ten days, and shall make an investigation thereof. . . .

42 USC § 2000e-5 (f)(1):

. . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action . . . or the Commission has not entered a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall . . . notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against *the respondent named in the charge*. . . .

42 USC § 2000e-5 (g):

If the court finds that *the respondent* has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin *the respondent* from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or

without back pay (payable by the employer, employment agency, or labor organization, as the case may be responsible for the unlawful employment practice) or any other equitable relief as the court deems appropriate. . . .

42 USC § 1981a (a) (1), (b) (1), (3):

(a) (1) In an action brought by a complaining party under section 706 . . . of the Civil Rights Act of 1964 [Title VII] . . . against *a respondent* who engaged in unlawful intentional discrimination . . . and provided the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706 (g) of the Civil Rights Act of 1964 [42 USC § 2000e-5 (g)], from *the respondent*.

(b) (1) A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that *the respondent* engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(b) (3) The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party –

(A) in the case of *a respondent* who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of *a respondent* who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000;

(C) in the case of *a respondent* who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000;

(D) in the case of *a respondent* who has more than 500 in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

STATEMENT OF THE CASE

Petitioner is a former waitress who worked at Maxwell's Plum restaurant, located at Ghirardelli Square in San Francisco. The company that operated the restaurant, Maxwell's International, Inc., went into bankruptcy in 1983. The restaurant closed down in approximately 1987.

In this case, petitioner has not sued her employer, but rather, several individuals who also worked for Maxwell's International, Inc.

Petitioner's initial pleading was filed on April 24, 1987. It was virtually incomprehensible and respondents filed a motion to dismiss or, in the alternative, motion for more definite statement. Prior to the hearing on the

motion, petitioner filed a first amended complaint. It suffered from the same basic defects, and respondents renewed their motion. The motion was granted by the district court on July 25, 1989. Appendix G.[1]

Petitioner's second amended complaint was filed on September 20, 1989. Respondents made another motion to dismiss, which was granted on January 17, 1990. Appendix H. The district court (per Schwarzer, J.) court made the following observations:

> "[Petitioner] has created extraordinary difficulty for the Court by insisting on disregarding the Court's prior order concerning the form of her pleading and cluttering her complaint with pejorative, argumentative and irrelevant assertions and numerous citations to and quotations from legal authorities. . . . were it not for the fact that [petitioner] is appearing *pro se* (though apparently with legal assistance off stage), this action would be dismissed. With this order, the Court will give petitioner one more opportunity to file a complaint that passes muster. . . . "

Appendix H-1.

The district court then addressed the individual respondents' contention that Title VII does not impose

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[1] "Appendix" references refer to the various documents attached to the Petition and this Response. Appendices A through J, inclusive are attached to the Petition. Appendices K and L are attached to this Response.

personal liability on them for back pay awards.[2] Respondents' contention was simple and straightforward: they were not petitioner's "employer," but rather, fellow employees who, along with petitioner, worked for a corporate entity. The court noted that the issue of individual liability is "shrouded in uncertainty." Appendix H-2. The court commented that "it is unlikely that Congress intended to impose personal liability on employees," but concluded, in the absence of definite guidance from the Ninth Circuit, "that it may be possible for petitioner to prove facts entitling her to relief and that therefore a complaint asserting individual liability for back pay cannot automatically be dismissed." Appendix H-3 & 4.

Judge Schwarzer admonished petitioner that "it will not do simply to allege conspiracies or generalized discriminatory practices." Appendix H-4. Petitioner was required to allege specific acts of intentional discrimination by specific people in order to proceed. The court also noted that even if such acts could be alleged, petitioner's settlement with her employer (she had received $24,000 from the bankruptcy proceedings involving Maxwell's Plum) would be an offset against any recovery in this action. Appendix H-4. The court specifically reminded petitioner that she could not recover compensatory or punitive damages under Title VII.

Petitioner's third amended complaint was filed on February 1, 1990. Appendix E. The case was assigned to the Honorable Vaughn R. Walker shortly thereafter.

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[2] The pleading in this case occurred well prior to the 1991 amendments to Title VII, at a time when back pay was the only monetary relief available to petitioner under the statute.

On February 16, 1990, respondents moved to dismiss the complaint. The motion was heard by the court on April 20, 1990 and was granted on May 18, 1990. Appendix B. The district court dismissed petitioner's Title VII claims, in part, due to her failure to name the individual defendants as respondents in her EEOC charges. The court also concluded that petitioner had failed to state a claim upon which relief could be granted. Appendix B-9 & 10. The court specifically noted the prejudice to the individual respondents caused by petitioner's failing to put them on notice that they might be subject, years later, to a lawsuit seeking to impose personal liability. They were never advised of the need to gather evidence with which to defend themselves. See Appendix H-10.

The district court analyzed the allegations of the third amended complaint, which include the following:

Plaintiff alleges that she was employed by Maxwell's Plum restaurant starting in August 1982. Appendix E, ¶ 4 (further references to the third amended complaint are directly to individual paragraphs). Petitioner alleges that respondent Dino La Rosa ("La Rosa"), then General Manager of the restaurant, hired her as a hostess and promised that she would be promoted when a higher position became available. ¶¶ 35-36.

Plaintiff alleges that in the spring and summer of 1983, she managed the "Terrace Garden" breakfast room, although she claims to have been paid hostess wages for her work. ¶¶ 38-39. In the fall of 1983, petitioner began to complain to La Rosa and to respondent Carlo Galazzo

("Galazzo") that she believed she was being discriminated against. She alleges that respondents took no action to correct the situation. ¶ 40.

Petitioner alleges that in January 1984, La Rosa discriminated against her by reducing her hours. ¶ 13. Upon petitioner's request, the Hotel and Restaurant Employees & Bartenders Union ("Union") protested. *Ibid.* She contends that in the spring and summer of 1984, La Rosa and Galazzo retaliated by replacing her as hostess with two younger employees (¶ 16); reducing her hours (¶ 17); refusing to promote her to a front-of-the-house management position, or to a banquet director-trainee, denying culinary training that had been promised, writing false letters about her job performance, and otherwise harassing her. ¶¶ 14-19.

Petitioner further alleges that in May or June 1984, La Rosa and Galazzo made comments to her on several occasions that she was "too old" and would never be promoted because she was a woman. ¶¶ 21-24. She alleges that she filled-in as a dining room director several times a week, but was not paid managerial wages for her work. Some time in the summer of 1984, petitioner's Union again intervened on her behalf. She alleges that in July 1984, La Rosa terminated her because of her age and in retaliation for her request for Union intervention. ¶ 27.

The Union filed a grievance on petitioner's behalf, and in October of 1984 petitioner herself proceeded to file a charge with the Equal Employment Opportunity Commission ("EEOC"). A month later, she filed a separate charge with the National Labor Relations Board ("NLRB"). ¶ 28.

As a result of a Union arbitration on the grievance, petitioner was reinstated and awarded back pay. ¶ 28. With respect to the EEOC proceedings, petitioner asserts that in March of 1985, petitioners La Rosa and Huy Bui gave "false testimony" against her. ¶ 59.

Petitioner claims that the restaurant refused to honor the grievance arbitration award by delaying her return to work, and then by refusing to give her a full working schedule. ¶ 29. She claims that in October 1985, Galazzo threatened her that she would have a "hard time" if she remained at work. ¶¶ 30-31. On October 30, 1985, petitioner filed a second NLRB charge against the restaurant over the denial of a full schedule. ¶ 32. She contends that immediately upon receipt of this charge, and on November 8, 1985, petitioners Huy Bui and Don Bohn gave her written and verbal notice that she was being terminated again, and she claims that on the following day, petitioners Robert Stewart and Carlo Galazzo issued a formal termination notice. She further contends that Galazzo, Bui and Bohn refused to write letters of recommendation for her. She contends that these actions were taken in retaliation for her having filed the NLRB charge. ¶¶ 32-33.

Petitioner filed a second EEOC charge in November of 1985. The complaint does not specifically state what happened next, but it appears that petitioner was reinstated at the restaurant, as she alleges she was laid off again in January of 1986. ¶ 51. Petitioner alleges that after she requested her Union to intercede on her behalf, she was terminated for a third time on some unspecified date after March 17, 1986. ¶¶ 52-53.

Petitioner also contends that Galazzo informed a third party that she (Ms. Miller) was the owner of Maxwell's Plum restaurant, and that as a result the third party claimant sued her, instead of the restaurant, for back wages. ¶ 60.

Petitioner alleges that at a subsequent EEOC hearing, petitioners Stewart and Galazzo testified that they had implemented the final termination. ¶ 53. She further states that in the spring and summer of 1986, Galazzo denied her unemployment benefits (¶ 54) and that in January of 1987, petitioners Stewart, Bohn and Bui gave "false testimony" at an Unemployment Appeals Board hearing. ¶ 55.

The district court had ordered petitioner to attach copies of her EEOC charges to her amended pleading. Appendix G-2. She did not comply. The burden fell to the respondents to obtain and submit the EEOC records to the court. As an excerpt from those records reveals, the EEOC spent considerable time reviewing petitioner's claims, ultimately concluding that petitioner was not qualified for promotion. See Appendix L-10-11. On December 30, 1986, over two years after the filing of the original charge, the EEOC issued petitioner a right to sue letter, and this litigation followed.

REASONS FOR DENYING THE WRIT

Introduction

Respondents DINO LA ROSA, CARLO GALAZZO, DON BOHN, HUY D. BUI, ROBERT STEWART and DONALD SCHUPAK hereby oppose the petition for writ

of certiorari filed on behalf of Phyllis Miller, and they respectfully pray that the petition be denied.

At the outset, respondents note that this case involves a ring-wise, litigation savvy petitioner who has shown a remarkable ability to continually harass the individual respondents in this action. Despite filing incomprehensible pleadings (see, e.g,. Appendix G-2), petitioner has persisted in filing a "kitchen sink" complaint, in which she accuses virtually anyone who had anything to do with her at the former Maxwell's Plum restaurant of not only discriminating against her, but of giving "false testimony" (see Appendix E, ¶¶ 55, 59), inflicting emotional distress (¶¶ 57-66), defaming her (¶ 63), and tormenting her (¶ 21).

Even with her obvious energy and persistence, petitioner did not pursue the individual respondents in federal court until *after* she first: pursued arbitration under a collective bargaining agreement (Appendix E, ¶ 28); filed for unemployment benefits (Appendix E, ¶ 55); filed two EEOC charges (which did not identify these respondents as the parties complained against, see Appendix B 9-10); filed two NLRB charges (see Appendix E, ¶¶ 28, 32); and filed a state court lawsuit that languished untouched for three years, after which it was dismissed (see Appendix K). Moreover, petitioner did not proceed against these respondents until after she had reached a substantial monetary settlement with her employer in the bankruptcy court (Appendix F).

In short, the present claims are not being brought by a timid, *pro se* petitioner who does not know her way around a courtroom. Quite to the contrary, these charges

are being asserted by a crafty litigant who has seen fit to place her generalized woes before no less than eight different legal tribunals: (1) a Union arbitrator; (2) the California Unemployment Insurance Board; (3) the NLRB; (4) the EEOC; (5) the California Superior Court; (6) the United States District Court; (7) the Ninth Circuit, and now (8) the Supreme Court of the United States.

As we shall explain, it is time for this litigation free-for-all to come to an end.

I.

CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO JURISDICTION TO CONSIDER PETITIONER'S APPEAL.

A. PETITIONER DID NOT FILE A TIMELY NOTICE OF APPEAL PURSUANT TO FRAP 4. PETITIONER'S MOTION FOR RECONSIDERATION IN THE DISTRICT COURT, EVEN IF DEEMED A MOTION FOR NEW TRIAL UNDER FRCivP 59, WAS NOT TIMELY, AND THEREFORE DID NOT EXTEND OR ENLARGE THE TIME LIMIT FOR FILING A NOTICE OF APPEAL.

The judgment of the district court dismissing petitioner's third amended complaint was entered in the civil docket on May 23, 1990. Pursuant to Rules 3 (a) and 4 (a)(1) of the Federal Rules of Appellate Procedure (FRAP), petitioner was required to file a notice of appeal within thirty days. The final date for filing the notice of

appeal was June 22, 1990[3] Plaintiff did not file her notice of appeal until August 30, 1990, which was over two months late. See 991 F.2d at 585.

The only way the appellate filing deadline could have been extended was if petitioner had either: (a) filed a motion for extension of time under FRAP 4 (5), or (b) filed a *timely* motion for a new trial or a motion to amend the judgment pursuant to FRCivP 59. Petitioner did neither.

Instead, on June 4, 1990, petitioner filed a request for an extension of time to file a self-styled "motion for reconsideration" of the district court's order of dismissal. The district court granted the request, ordering that petitioner's motion be filed by June 26, 1990. Appendix I.

The district court did not have authority to grant the extension of time, for to the extent petitioner's motion for reconsideration was in essence a motion or a new trial under FRCivP 59, it had to be filed within 10 days of the entry of judgment. The district court has no jurisdiction to extend the 10 day filing period. See FRCivP 6 (b).

Consequently, as of June 22, 1990 (the filing deadline for the notice of appeal), petitioner had not perfected her appeal by filing the proper notice, nor had she filed a

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[3] Calculation of the time period is governed by FRAP 26, which states that the "day of the act . . . from which the designated period of time begins to run shall not be included." Thus, the appellate filing deadline commenced to run on May 24th, the day after entry of judgment. The 30th day thereafter was June 22, 1990.

timely Rule 59 motion. As a result, she lost the right to appeal from the district court's judgment.

B. THE NINTH CIRCUIT MISAPPLIED THE "UNIQUE CIRCUMSTANCES" DOCTRINE OF *THOMPSON v. IMMIGRATION SERVICE*. PURSUANT TO *OSTERNECK v. ERNST & WHINNEY*, 489 US 169 (1989), A LATE NOTICE OF APPEAL IS EXCUSED ONLY WHERE THE DISTRICT COURT HAS SPECIFICALLY MISLED A PARTY BY INCORRECTLY STATING THAT A PROPER APPEAL HAS BEEN PERFECTED.

The Court of Appeals noted the jurisdictional problem, 991 F.2d at 585-586, but chose to avoid it by applying the "unique circumstances" doctrine of *Barry v. Bowen*, 825 F.2d 1324 (9th Cir. 1987), which is rooted in this Court's decision in *Thompson v. INS*, 375 US 384 (1964).

We respectfully suggest that the court's decision in this regard was error. As explained by this Court in *Osterneck v. Ernst & Whinney*, 489 US 169 (1989), the "unique circumstances" rule does not apply here. In *Osterneck*, the Court observed that:

> "Petitioners contend that the rationale of *Thompson* is applicable here because certain statements made by the District Court, as well as certain actions taken by the District Court, the District Court Clerk, and the Court of Appeals, led them to believe that their notice of appeal was timely. After reviewing these claims, the Court of Appeals declined to apply the *Thompson* exception, concluding: 'At no time has the district court or this court ever affirmatively

> represented to the Osternecks that their appeal was timely filed, nor did the Osternecks ever seek such assurance from either court.' "

489 US at 178-79.

As if to underscore the point, the Court went on to comment that the *Thompson* doctrine only applies:

> " . . . where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done. That is not the case here."

489 US at 179.

Because the Osternecks' notice of appeal was late, the circuit court did not have jurisdiction to consider the appeal, and it was dismissed. This Court affirmed the dismissal.

The present case should yield an identical result, for there was no timely filing of a notice of appeal, and there was no specific statement by either the district court or the court of appeals that misled petitioner into believing she had perfected her appeal. As *Osterneck* makes clear, the mere granting of the extension of time by the district court on June 4, 1990 does not meet the *Thompson* test; there must be a "specific assurance" by a judicial officer that an appeal had been perfected.

This jurisdictional thicket was duly noted by the Court of Appeals, which requested specific briefing on the point. Unfortunately, the court came to the incorrect

conclusion on the issue, as it failed to heed (or even cite) this Court's decision in *Osterneck*.[4]

The *Osterneck* rule is entirely correct. Courts have long noted that procedural rules should be applied mechanically, even if the result in a given case might seem arbitrary. *Pavelic & Le Flore v. Marvel Entertainment Group*, 493 US 120, 126 (1989) ("Our task is to apply the text, not to improve upon it."). "In the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of even nanded administration of the law." *Mohasco Corp. v. Silver*, 447 US 807, 826 (1980). Procedural requirements cannot be cast aside "out of a vague sympathy for particular litigants." *Baldwin County Welcome Center v. Brown*, 466 US 147, 152 (1984). These considerations are particularly true in cases involving jurisdictional rules. See, e.g., *Torres v. Oakland Scavenger Co.*, 487 US 312 (1988).

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[4] The district court was well aware of the jurisdictional dilemma confronting petitioner on appeal. See Appendix J. The problem was not of the court's making, but of petitioner's making. That the district court chose to let petitioner off the jurisdictional hook, even for the best of motives, does not cure the problem, and in fact will lead to mischief in the future as parties will never be certain as to when the time limits expire, and when relief can be granted. As *Osterneck* makes clear, the proper solution to the problem is to apply the rules strictly, so everyone knows what must be filed, where it must be filed, and when it must be filed. The sole exception to the strict application of jurisdictional time limits is the unique and isolated case in which a court mistakenly says to a party "Don't worry. Your appeal has been perfected." It is only in that rare circumstance that this Court has permitted anotherwise tardy appeal to proceed.

> "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. See, e.g., *Marbury v. Madison*, 1 Cranch (5 US) 137, 173-180 (1803). For that reason, every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 US 237, 244 (1934). See *Juidice v. Vail*, 430 US 327, 331-332 (1977) (standing). 'And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit. *United States v. Corrick*, 298 US 435, 440 (1936) (footnotes omitted).' "
>
> *Bender v. Williamsport Area School District*, 475 US 534, 541, *rehearing denied*, 476 US 1132 (1986) (footnote omitted).

For these reasons, the petition should be denied, or in the alternative, granted and the court of appeals decision vacated on the ground that there was no jurisdiction to consider petitioner's appeal from the judgment of the district court.

II.

CERTIORARI SHOULD BE DENIED BECAUSE THE NINTH CIRCUIT'S DECISION IS CORRECT ON THE MERITS. LIABILITY UNDER TITLE VII IS FOCUSED ON THE EMPLOYER, AS OPPOSED TO FELLOW EMPLOYEES OR SUPERVISORS.

A. THE STATUTE DOES NOT FIX LIABILITY ON "ANY PERSON," BUT RATHER, CONCENTRATES ON EMPLOYERS WHO FAIL TO PROVIDE EQUAL EMPLOYMENT OPPORTUNITY.

At the time Title VII was enacted into law in 1964, the statute provided two types of remedies: injunctive relief and back pay. See 42 USC § 2000e-5 (g). Given the fact that the employing entity is the appropriate target of injunctive relief to correct employment conditions, coupled with the reality that only employers are responsible for compensation and benefits, it was altogether natural and fitting for Congress to fix liability on employers under Title VII.

Thus, Title VII makes it an unlawful employment practice for *an employer* to discriminate on the basis of race, color, religion, sex or national origin. 42 USC § 2000e-2 (a). And if illegal discrimination is found, the court may order *the employer* to reinstate the injured victim and provide back pay. 42 USC § 2000e-5 (g). Although these remedies are often imposed on an employer due to *respondeat superior* liability (i.e., in cases where one employee discriminates against another), that is a far cry from saying Congress intended the liability to flow to individual employees, in addition to the employing entity.

Petitioner argues that by defining the term "employer" to include the employer's "agents" (see 42 USC § 2000e (b)), Congress intended to impose such expansive liability. But that is a convoluted, twisted reading of the statute, and it is at odds with Congressional intent as expressed in the plain wording of Title VII. The statute speaks of *employer* liability, not the joint and several liability of employers and supervisory employees.

B. HAD CONGRESS DESIRED TO ENACT A BROADER SWEEP OF LIABILITY, IT WOULD HAVE USED DIFFERENT LANGUAGE IN THE STATUTE.

Had Congress intended to extend liability beyond the employing entity, it could have done so with simple, declarative words. For example, instead of using language to the effect that "the employer shall not discriminate in the workplace," Congress would have said "*no person* shall discriminate in the workplace." Had the latter formulation been chosen, there would be no question that liability embraced all persons, including supervisory employees, who participated in discriminatory conduct.

That Congress knew how to use such a verbal formula is beyond question, for in another portion of the statute, the drafters took care to state that "*no person* shall . . . deprive . . . any person of any right or privilege secured by [Title II dealing with public accommodations]." See 42 USC § 2000a-2. An action for preventive relief to correct discrimination in public accommodations

may be brought against *"any person"* violating the Act. See 42 USC § 2000a-3 (a).[5]

The portion of Title VII dealing with the filing of charges of discrimination further illustrates the point. In § 2000e-5, Congress provided that charges of discrimination may be filed against "an employer, employment agency, labor organization, or joint labor-management committee." 42 USC § 2000e-5 (b). If Congress intended for such charges to be filed against "any person," why not use those very words? Congress continues its deliberate approach to the problem by further stating that subsequent legal proceedings may be filed only against "the respondent named in the [EEOC] charge." 42 USC § 2000e-5 (f)(1). Once again, if Congress meant to open up the nation's courthouses for suits against "any person" violating Title VII, why not just say so?

The fact of the matter is that Congress intended to deal with job discrimination at its ultimate source, by making *employers* responsible to correct the problem. Even when the statute was amended in 1991, at which time the available relief was expanded to include general and punitive damages, the definition of "employer" was not changed, nor were any of the provisions of the above-referenced sections. All that happened was that the price

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[5] By way of contrast, under Title VII, actions for relief may be brought only against "the respondent" named in the charge of discrimination filed with the EEOC. See 42 USC § 2000e-5 (f)(1). The administrative charge is where the claimant alleges that "an employer, employment agency, labor organization, or joint labor-management committee . . . has engaged in an unlawful employment practice. . . . " 42 USC § 2000e-5 (b).

tag for discrimination – a price tag that Congress has chosen to hang around the shoulders of employers – was raised substantially. See 42 USC § 1981a.[6]

We do not contend that Congress lacks the power to impose individual liability under Title VII. Our limited submission is that Congress has not done so. Any decision to alter the text of Title VII should be made in the national legislature, rather than in the chambers of this Court.

Because the Ninth Circuit's decision in this case is fundamentally correct and in keeping with the language of Title VII, it should be allowed to stand.

CONCLUSION

The present case involves a petitioner whose initial pleading was incomprehensible. See Appendix G-2. The case also involves a petitioner who has pursued remedies before state administrative tribunals (Appendix E-10 [¶¶ 54-55]), before the EEOC (*Ibid.*, ¶ 59), and before the NLRB (*Ibid.*, ¶ 31). In addition, before pursuing this litigation, petitioner filed a state court lawsuit, only to have it dismissed for lack of prosecution.[7]

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[6] The Ninth Circuit noted that when Congress amended Title VII in 1991, it limited available damage remedies to the size of the employer. See 991 F.2d at 587 & n. 2. Had Congress envisioned individual liability, as opposed to *employer* liability, why would there be such limitations?

[7] The state court proceedings were placed before the district court via defendant's proof of official records, filed

In addition, petitioner settled her claims with her employer in bankruptcy court and received a substantial settlement, which is an offset against any potential recovery here. Appendix F, H-4.

Finally, this case involves a petitioner who did not suffer any substantial damages. Even if one assumes petitioner was discriminated against (which respondents dispute, of course), this case involves a restaurant that went out of business several years ago. At the time this case began in the district court, there was (and is) no ongoing job for petitioner to fill because the employer had ceased operations.

Even if the Court were to recognize a conflict between the Ninth Circuit's decision and others around the country, this case is not the proper vehicle for exploring such far reaching Title VII issues. This case should be allowed to die a natural death, which is what happened in 1990 when petitioner did not file a timely notice of appeal.

As we have shown, there is no jurisdiction for petitioner's appeal, and on that ground alone, the petition should be denied. Even if the Court reaches the merits of the Title VII issue, the Ninth Circuit's decision is correct and should be allowed to stand. Other decisions cited by petitioner, which distort Title VII beyond its plain meaning, should be disapproved. If Congress desires to provide for individual liability, all it needs to do is redraft the statute in simple terms and provide for such liability.

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pursuant to FRCivP 44. A copy of defendants' filing is reproduced as Appendix K to this response.

To date, however, it has not done so, and the proper role for this Court is to adhere to the express language of the statute. Even if the Court disagrees with the Ninth Circuit's decision, given the jurisdictional flaw in the appeal, the correct procedure would be for this Court to vacate the decision below and remand for dismissal for lack of jurisdiction.

The petition should be DENIED.

Dated: January 5, 1994

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**Counsel of Record*

APPENDIX K

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DON BOHN, BUI DUC HUI,
ROBERT STEWART, and DONALD
SCHUPAK

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PHYLLIS MILLER,
Plaintiff,
v.
MAXWELL'S INTERNATIONAL, et al.,
Defendants.

(Filed June 20, 1989)

Case No.
C-87-1906 WWS

PROOF OF OFFICIAL RECORDS
(Certified Copies of Plaintiff's State Court Complaint and Orders Dismissing the Same)
(Fed. Rules. Civ. Proc. Rule 44.)

Date: July 21, 1989
Time: 11:00 a.m.
Place: Courtroom No. 9
19th Floor
U.S. Courthouse
450 Golden Gate Ave.
San Francisco, CA 94102

Pursuant to Rule 44 of the Federal Rules of Civil Procedure, defendants hereby present to the Court certified copies of the following documents, and offer them as proof of official records maintained by the Superior Court of California, In and For the City and County of San Francisco:

(1) Certified Copy of First Amended Complaint filed by Phyllis Miller, filed in the San Francisco Superior Court Action No. 842-195 on December 6, 1985;

(2) Certified Copy of order dismissing plaintiff's action;

(3) Certified Copy of order granting defendants' motion to reconsider order of dismissal (adding defendant MAXWELL's OF SAN FRANCISCO to earlier order).

Dated: June 20, 1989

Respectfully submitted,

DOBBS, BERGER, MOLINARI, CASALNUOVO, VANNELLI & NADEL

By /s/ Robert D. Links
ROBERT D. LINKS
Attorneys for Defendants CARLO GALAZZO, DINO LA ROSA, DON BOHN, BUI DUC HUI, ROBERT STEWART and DONALD SCHUPAK

PHYLLIS M. MILLER
640 Post Street, #405
San Francisco, California 94109
Telephone: (415) 441-5331

In Pro Per

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO

PHYLLIS M. MILLER, Plaintiff, vs. MAXWELL'S PLUM, a corporation, DINO LA ROSA, an individual, HUI BOI, an individual, DONALD SCHUPAK, an individual, CARLO GALAZZA, an individual, and DOES I-XXX, inclusive Defendants.	No. 842195 **FIRST AMENDED COMPLAINT FOR DAMAGES:** **WRONGFUL TERMINATION** **BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING** **NEGLIGENCE - FAILURE TO WARN** **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS** **INTERFERENCE WITH CONTRACTUAL RELATIONS SEX AND AGE DISCRIMINATION** **RETALIATION**

Plaintiff alleges:

FIRST CAUSE OF ACTION WRONGFUL TERMINATION

(Filed Dec. 6, 1985)

1. This is a complaint by a discharged employee against her former employer for damages arising out of the termination of her employment.

2. Plaintiff PHYLLIS M. MILLER is a female resident of the State of California and the City and County of San Francisco. She was at all relevant times over the age of 40.

3. Defendant MAXWELL'S PLUM is a corporation with its principal place of business in San Francisco, California, Plaintiff is not certain of the exact title of this defendant and will amend if necessary to reflect the exact title.

4. Defendant DINO LA ROSA (hereinafter referred to as "LA ROSA") was at certain relevant times herein the manager of MAXWELL'S PLUM.

5. Plaintiff HUI BOI was at all relevant times employed by MAXWELL'S PLUM.

6. Defendant DONALD SCHUPAK (hereinafter referred to as "SCHUPAK") was at certain relevant times herein the manager of MAXWELL's PLUM.

7. Defendant CARLO GALAZZA (hereinafter referred to as "GALAZZA") was at certain relevant times herein Chief Executive Officer of MAXWELL's PLUM.

8. Plaintiff is informed and believes and thereon alleges that at all times mentioned herein the Defendants, and each of them, was the agent of the other in doing the things hereinafter alleged and was acting within the

course and scope of such agency with permission and consent of his or her co-Defendant.

9. Plaintiff is ignorant of the true names and capacities of Defendants sued herein as DOES I-XXX, inclusive, and therefore sues the Defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.

10. Following the occurrence of the acts of which she complains herein, plaintiff filed timely charges of employment discrimination with the United States Equal Employment Opportunity Commission and the California Department of Fair Employment & Housing (hereinafter "DFEH") against defendants.

11. On November 20, 1984, the DFEH issued notice of plaintiff's right to sue defendants within one year. This action was filed within one year thereafter.

12. Plaintiff was hired by defendant MAXWELL'S PLUM in August of 1982.

13. During the spring of 1983, Plaintiff managed a special breakfast room at defendant's San Francisco facility. That summer, she opened and managed defendant's Terrace Room. Plaintiff was told her work performance was excellent and her attendance record was unblemished.

14. Plaintiff was not paid managerial level wages for the work at that level which she performed, nor was she compensated for extra hours worked.

15. When a younger female employee wanted her schedule changed, defendants reduced plaintiff's hours.

16. Plaintiff performed the work of a Maitre d', but was denied promotion to this position when it became vacant. This position was filled by a man.

17. During the last two weeks of June, 1984, plaintiff did not work because of a personal absence. Plaintiff called defendant's daily during the first part of July to obtain her work schedule. Finally, in July, 1984, plaintiff was told she was terminated. Personal absences of male employees were typically accommodated by defendants.

18. Defendant LA ROSA commented to plaintiff that he "got rid" of her, that she was "too old", that she should "go home", and that she should "get married" and "get a husband to take care of you."

19. Plaintiff's treatment in this respect was far inferior to the treatment of similarly situated males under 40.

20. A substantial or motivating factor for defendants' treatment of plaintiff, as described above, was her sex and/or her age.

21. As a proximate result of the aforementioned wrongful acts of Defendants, and each of them, Plaintiff has been rendered unemployed, and has been unable to find comparable employment and has lost back wages and certain other employment benefits to be proven at trial.

22. The above said acts of Defendants constituted a wrongful termination of Plaintiff; such wrongful termination was a substantial factor in causing damage and injury to Plaintiff as set forth below.

23. As a result of the aforesaid acts of Defendants, Plaintiff has lost and will continue to lose income and

benefits, in an amount to be proven at time of trial. Plaintiff claims such amount as damages together with prejudgment interest pursuant to California Civil Code Section 3287 and/or any other provision of law providing for prejudgment interest.

24. As a result of the aforesaid acts of Defendants, Plaintiff has become mentally upset, distressed and aggravated. Plaintiff claims general damages for such mental distress and aggravation in an amount to be proven at trial.

25. Because the acts taken toward Plaintiff were carried out by Defendants acting in a deliberate, cold, callous and intentional manner in order to injure and damage Plaintiff, Plaintiff requests the assessment of punitive damages against Defendants, and each of them, in an amount to be proven at trial.

SECOND CAUSE OF ACTION RETALIATION

26. Plaintiff realleges and incorporates by reference each and every allegation set forth in Paragraphs 1 through 22 as though fully set forth herein.

27. On July 22, 1985, Arbitrator David A. Concepcion sustained plaintiff's grievance based on the foregoing facts and ruled that "Phyllis Miller was not discharged for just cause."

28. Though defendants agreed that Arbitrator Concepcion would retain jurisdiction over disputes regarding reinstatement, benefits, and back pay which were awarded, they thereafter repudiated his jurisdiction and

refused to submit to his authority, thereby forcing plaintiff to seek relief of this court.

29. Following plaintiff's reinstatement, defendants, including but not limited to defendants SCHUPAK and GALAZOO, embarked on a program of retaliatory acts designed to cause plaintiff mental and emotional strain, because she had successfully challenged their illegal activities.

30. The damage allegations of plaintiff 23 through 25 are incorporated by reference and for the purpose of this cause of action shall refer to acts which constitute retaliation in violation of applicable law.

THIRD CAUSE OF ACTION
BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

31. Plaintiff realleges and incorporates by reference each and every allegation set forth in Paragraphs 1 through 30 as though fully set forth herein.

32. Plaintiff was employed by Defendant MAXWELL's PLUM under an oral contract of employment as modified by certain practices of Defendant MAXWELL'S PLUM. Plaintiff had a contract of employment for an indefinite term with MAXWELL'S PLUM. This indefinite term was to continue as long as Plaintiff performed her job in a satisfactory manner, and discharge, if any, would only be for good cause proven.

33. Into the relationship between Plaintiff and Defendant employer, the law of the State of California implied a covenant of good faith and fair dealing. This

covenant requires that each party to the employment contract act with fairness and good faith toward the other, and that neither party should take any action to prevent the other from reaping the benefits of the relationship. The covenant further required Defendant employer to refrain from heedless injury or damage toward Plaintiff.

34. The above said acts of Defendant employer MAXWELL'S PLUM constituted a breach of the covenant of good faith and fair dealing; said breach was a substantial factor in causing damage and injury to Plaintiff as set forth below.

35. The damage allegations of paragraphs 23 through 25 are incorporated by reference and for the purpose of this cause of action shall refer to acts which constitute a breach of the covenant of good faith and fair dealing.

FOURTH CAUSE OF ACTION
NEGLIGENCE – FAILURE TO WARN

36. Plaintiff realleges and incorporates by reference each and every allegation set forth in paragraphs 1 through 35 as though fully set forth herein.

37. Defendant MAXWELL'S PLUM also owed a duty to Plaintiff to deal with her fairly and in good faith. Defendant MAXWELL'S PLUM also owed a duty to Plaintiff to terminate her only for good cause. Defendant MAXWELL'S PLUM also owed a duty to warn Plaintiff if her work and conduct were inadequate or unacceptable so that Plaintiff would have an opportunity to correct

such inadequate or unacceptable work and conduct prior to Defendant's notice of termination to Plaintiff.

38. Defendants knew or should have known that Plaintiff's previous job performance had been adequate and that Plaintiff had no reason to fear for her job.

39. By failing to inform Plaintiff of any job performance deficiencies, and failing to inform Plaintiff that a risk of termination existed, Defendant MAXWELL'S PLUM breached its duty of reasonable care to Plaintiff and deprived Plaintiff of the opportunity of improving her job performance prior to his termination.

40. The above said acts constitute a breach of Defendant MAXWELL'S PLUM's duty of reasonable care to warn Plaintiff; such breach was a substantial factor in causing damage and injury to Plaintiff as set forth below.

41. The damage allegations of paragraphs 23 through 25 are incorporated by reference and for the purpose of this cause of action shall refer to acts which constitute negligence.

FIFTH CAUSE OF ACTION
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

42. Plaintiff realleges and incorporates by reference each and every allegation set forth in Paragraphs 36 through 41 as though fully set forth herein.

43. The foregoing conduct was extreme and outrages and an abuse of the authority and position of Defendants. Said conduct was intended to cause severe

emotional distress or was done in reckless disregard of the probability of causing such distress.

44. The foregoing conduct did in fact cause Plaintiff to suffer extreme emotional distress. As a proximate result of said conduct Plaintiff suffered embarrassment, anxiety, humiliation and emotional distress, and will continue to suffer said emotional distress in the future, in an amount according to proof.

45. Defendants committed the acts alleged herein maliciously, fraudulently and oppressively, with the wrongful intention of injuring Plaintiff, from an improper and evil motive amounting to malice, and in conscious disregard of Plaintiff's rights. Plaintiff is thus entitled to recover punitive damages from Defendants in an amount according to proof.

SIXTH CAUSE OF ACTION
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

46. Plaintiff realleges and incorporates by reference each and every allegation set forth in Paragraphs 1 through 45 as though fully set forth herein.

47. Defendants knew, or should have known with the exercise of reasonable care, that the foregoing conduct would cause serious emotional distress to Plaintiff. As a proximate result of Defendants' negligent conduct, Plaintiff has suffered and continues to suffer embarrassment, mental anguish and emotional distress in an amount according to proof.

WHEREFORE, Plaintiff prays judgment as follows:

1. For reinstatement and full restitution of the employment rights;

2. For back pay in order to make Plaintiff whole for injuries sustained on account of Defendants' acts;

3. For front pay, to compensate Plaintiff for the future effects of Defendants' actions, in an amount subject to proof;

4. For compensatory and punitive damages in the amount of ten million dollars ($10,000,000.00);

5. Interest on all back pay and benefits awarded in an amount reflecting the rate of inflation, to make Plaintiff whole and to deter Defendants from engaging in such activity in the future;

6. Special damages according to proof;

7. Reasonable attorney's fees and costs of suit incurred herein; and

8. Such other and further relief as the court may deem proper.

DATED: December 6, 1985

/s/ Phyllis M. Miller
Phyllis M. Miller

[SEAL]

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MAXWELL'S INTERNATIONAL, et al.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO

PHYLLIS MILLER, Plaintiff, v. MAXWELL'S INTERNATIONAL, et al., Defendants.	NO. 842-195 ORDER DISMISSING ACTION Date: April 5, 1989 Time: 9:30 a.m. Dept: 8, Law and Motion (Filed April 5, 1989)

On April 5, 1989, at the hour of 10:30 AM, the motion of defendants CARLO GALAZZO, HUI BOI, DINO LA ROSA, DONALD SCHUPAK & CO., INC., HORN & HARDART, INC., BRIGHT STAR HOLDING, INC., RUDY'S RESTAURANT GROUP, INC., DON BOHN, SAMURAI RESTAURANT INC., ALLISON BARBIARI, ROBERT STEWART and DONALD SCHUPAK, appearing specially, for an order dismissing the action, on the ground that plaintiff failed to serve process on the defendants within the mandatory three-year time period set forth in Sections 581.210, et seq., of the Code of Civil Procedure, came on regularly for hearing by the court.

Plaintiff, appearing in pro per, participated in the hearing by telephone; defendants appeared in court by and through their counsel of record, Howard W. Scott and Robert D. Links of the law firm of Dobbs, Berger, Molinari, Casalnuovo, Vannelli & Nadel.

The court having read and considered the papers filed in support of, and in opposition to, the motion; having heard and considered the arguments of plaintiff and defendants' counsel; and good cause being shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Defendants' motion is granted.

2. The court specifically finds that plaintiff failed to serve defendants with process within the mandatory three-year time period set forth in Code of Civil Procedure Sections 583.210, et seq.

3. Pursuant to Code of Civil Procedure Section 583.250 (b), the court orders that this action be dismissed.

4. Judgment shall be entered herein in favor of all defendants and against plaintiff. Counsel for defendants shall prepare an appropriate form of judgment and shall submit it to the court for approval, filing, and entry by the Clerk of the Court.

Dated: April 5, 1989

/s/ Stuart R. Pollak
JUDGE OF THE
SUPERIOR COURT
STUART R. POLLAK

[SEAL]

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MAXWELL'S INTERNATIONAL, et al.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO

PHYLLIS MILLER, Plaintiff, v. MAXWELL'S INTERNATIONAL, et al., Defendants.	NO. 842195 ORDER GRANTING MOTION TO RECONSIDER RULING, REGARDING MAXWELL'S OF SAN FRANCISCO Date: May 11, 1989 Time: 9:30 AM Dept: 8, Law and Motion (Filed May 24, 1989)

The court having received and reviewed defendants' motion to reconsider its April 5, 1989 ruling herein regarding MAXWELL'S OF SAN FRANCISCO, and having considered the arguments of counsel,

AND GOOD CAUSE APPEARING,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Defendants' motion to reconsider is granted.

2. The court's order herein, dated April 5, 1989, titled "Order Dismissing Action," is hereby amended to include defendant MAXWELL'S OF SAN FRANCISCO, and this action shall be dismissed without prejudice as to said defendant.

3. As stated in the April 5th order, counsel for defendants shall prepare an appropriate form of judgment.

Dated: 5/18/89

/s/ Stuart R. Pollak
JUDGE OF THE
SUPERIOR COURT

APPENDIX L

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Attorneys for Defendants

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

PHYLLIS MILLER, Plaintiff, v. MAXWELL'S INTER-NATIONAL, et al. Defendants.	No. C 87-1906 WWS DECLARATION OF ROBERT D. LINKS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND, IN THE ALTERNATIVE, MOTION FOR A MORE DEFINITE STATEMENT Date: November 17, 1989 Time: 11:00 A.M. Place: Courtroom 9, 19th Floor Federal Courthouse 450 Golden Gate Avenue San Francisco, CA

(Filed Oct. 16, 1989)

The undersigned hereby declares:

1. My name is Robert D. Links and I have personal knowledge of the matters set forth in this declaration. If

called as a witness, I could and would testify voluntarily thereto.

2. I am one of the attorneys representing defendants in this litigation. On or about September 20, 1989, I received a copy of plaintiff's second amended complaint. There were no exhibits physically attached to the complaint, but it was included in a box of materials, approximately four and a half inches thick, which were unlabeled and bound in various volumes separate and apart from the amended pleading. The materials appear to be copies of documents obtained from EEOC files, although I am not at all certain of that fact. Among the documents I found the following, each of which is attached hereto in its entirety as an exhibit:

Exhibit A: Letter of complaint from customer, dated September 20, 1983, regarding offensive treatment by plaintiff Phyllis Miller and Maxwell Plum's reply thereto, dated September 23, 1983;

Exhibit B: Memorandum dated September 23, 1983 distributed by Maxwell's Plum to "Andre, Dino, Phyllis" regarding the above-referenced complaint;

Exhibit C: Follow-up memo to plaintiff, dated February 3, 1984 regarding ongoing customer complaints;

Exhibit D: Further memorandum dated April 20, 1984 to plaintiff regarding ongoing customer complaints; and;

Exhibit E: Letter to plaintiff from EEOC staff analysts, dated August 28, 1986, indicating that the commission has investigated plaintiff's claims and found them to be without merit.

3. Although I have reviewed the various documents in the box that contained plaintiff's amended pleading, it is all but impossible or [sic] me to determine precisely what her complaints are, other than her vague references to "wrongful termination," "retaliation," "perjury," and the like. Because I have found the amended complaint to be virtually indecipherable, it has been necessary for me to file this motion to dismiss and, in the alternative, for a more definite statement.

I hereby declare the foregoing is true and correct and that this declaration was executed under the penalty of perjury of the laws of the State of California at San Francisco, California on October 12, 1989.

By /s/ Robert D. Links
ROBERT D. LINKS

EXHIBIT "A"

2011 California Street #15A
Mountain View, CA 94040
September 20, 1983

Mr. Dino LaRosa, General Manager
MAXWELL'S PLUM
900 North Point
San Francisco, CA 94109

Per my telcon of this afternoon with Susan, I am writing you to complaint about the hostess (Phyllis) at Maxwell's Plum Restaurant at Ghirardelli Square.

On Monday, September 5th, two of us went to lunch at your restaurant. We asked the hostess how long until we could be seated, and were immediately lead [sic] to the courtside of the restaurant. We asked if we could be seated on the Bay side, and the hostess began telling us that it would be 'at least 20 minutes' before we could be seated. I told her that was fine and she kept responding that it would be 'at least 20 minutes', as though we would be discouraged at the wait. I again told her that would be fine and that we would wait in the bar, again she gave the "20 minute" response and I finally asked her if there were some reason she did not want to seat us. She hesitated, then stated that there was no reason only that she wanted to be sure we knew it would be 'at least 20 minutes.' She made it clear that we were not the caliber acceptable to Maxwell's Plum. I told her again we would wait in the bar and I gave her my name. We had no sooner gone the ten steps to the bar than she told us she had " . . . a little table in the corner that she could *squeeze* us in to." We were seated and given a menu – no wine list.

Our waiter and busboy had their job cut out for them as by now we were on the defense. Our waiter was very good (perhaps not as attentive) and it was busy. Our busboy was marvelous – he made us feel very welcome, and treated us as though his only concern was our needs. He saved the day.

During our lunch, we noticed that several (4 or 5) parties were seated, and did not like the seating they were given, and asked the hostess to please seat them elsewhere. The hostess, upon being approached about different seating stated that they had to talk to the maitre d (Andre) as it

was his decision, and she would walk off leaving the people standing in the middle of the restaurant.

After our lunch, we were in the ladies room (downstairs) discussing the offensive treatment we had received from the hostess, when two other women began telling us that they had received the same treatment and attitude. They said they would not return because they did not like being treated as though they hadn't the money or the breeding to eat at Maxwell's Plum. The other women were with men, so the treatment was not reserved for the unescorted females.

When I returned home that evening, I called the restaurant to air my complaint. I asked for the manager, and was given Andre, to whom I told my story. He assured me that after he had talked with her and gotten her side of the story that he would contact me. To this date I have not heard from anyone, however, it is possible that the effort was put forth and that I was not available.

My apologies Mr. LaRosa if I have upset your day, but my relaxing day in the City was almost ruined by an employee of Maxwell's Plum. It is very difficult to justify someone's attitude when indirectly you are being charged for their services, and her haughty attitude is more than any person should be asked to endure.

Yours very cordially,
/s/ Sherry Sojka
Sherry Sojka

MAXWELL'S PLUM

GHIRARDELLI SQUARE

SAN FRANCISCO, CALIFORNIA 94109
(415) 441-1161

September 23, 1983

Ms. Sherry Sojka
2011 California St. #15A
Mountain View, CA. 94040

Dear Ms. Sojka,

First of all I would like to thank you for taking the time to write to us in regards to your dining experience here on Labor Day. Your letter was very detailed and informative. We appreciate the effort you have made to completely inform us of the events which occured. [sic] It is only through such letters as yours that we are able to learn of instances where our customers have been dissatisfied with their dining experience at Maxwell's Plum.

I was most distressed to learn of the situation, particularly so as we pride ourselves in providing total customer satisfaction. I would like to assure you that I have spoken with both the restaurant director and the hostess to insure that this situation will not occur again.

Please accept my apologises [sic] for the inconvienence [sic] caused by our staff. I hope that you will give us another opportunity in the near future to show that we do indeed care about our guests and providing complete customer satisfaction. Please call me personally before your next visit so that I can be sure that you receive the best table and service possible.

Again, thank you for your phone call and letter and please accept my apolgises. [sic]

Sincerely,

/s/ Dino La Rosa
Dino La Rosa
General Manager

EXHIBIT "B"

MAXWELL'S PLUM

GHIRARDELLI SQUARE

SAN FRANCISCO, CALIFORNIA 94109
(415) 441-1161

MEMO: SEPTEMBER 23, 1983

TO: ANDRE, DENNIS, PHYLLIS

FROM: DINO

SUBJECT: HOSTESS APPEARANCE AND MANNER

On Tuesday, Sept. 20th we received a telephone call from a customer who complained very strongly about the manner and treatment which she received from the front desk hostess at lunch on Labor Day. The major complaint was that the hostess was rude and condescending and that she was made to feel very unwelcome at Maxwell's Plum. In addition, she also stated that she had heard several women in the ladies room discussing the hostess and her manner. These women apparently said that they would not return to Maxwell's again because of the hostess.

Another important factor is that the customer called and spoke with Andre about the situation later that evening. Apparently Andre informed her that he would look into the situation and get back to her . . . which did not occur.

I cannot tell you how important it is to follow through with these complaints. And above all to have a pleasant front door staffed with people who make our customers feel welcome. I would like to *stress that we are here to please our customers and not our customers to please us.*

EXHIBIT "C"

February 3, 1984

MEMO

To: Phylis [sic] Miller

From: Dino LaRosa

Re: Front Desk Manner

Recently, several clients/customers have brought to my attention the fact that you bring your personal life and business into matters that deal *strickly* [sic] with business matters concerning the restaurant.

When a client requests my attention, to see me, to talk with me, simply take the message in a courteous manner and any further dealings with that person will be handled by myself or another department head.

Your personal life and business should not in any way enter your professional working hours.

YOUR IMMEDIATE COOPERATION IS REQUESTED.

Thank you.

EXHIBIT "D"

April 20, 1984

MEMO

To: Phyllis Miller

From: Dino LaRosa

Re: Customer Complaint

Once again I have received a complaint by telephone regarding your attitude and manner of handling a customer (Tuesday April 17, Lunch).

Her initial complaint was about not receiving a window table when many were empty and she had a reservation. But, more importantly, she felt the manner in which she was dealt with by you was most rude, derogatory and unprofessional.

I cannot stress enough, the importance of your job – you are the initial contact customers have upon entering this establishment. If they are treated in such a manner as stated above, what kind of impression does this leave them with?

This serves as your final warning regarding your job performance.

cc: Huy
Mike Welch- Local 2
File

EXHIBIT "E"

U.S. Equal Employment Opportunity Commission

San Francisco District Office

August 28, 1986

10 United Nations Plaza
San Francisco, California 94102
Telephone 415- 556-7093

Ms. Phyllis Miller
6440 Wornall Rd.
Kansas City, MO 64113

Re: Charge Nos. 091850037 and 091860183
P. Miller v. Maxwell's Plum

Dear Ms. Miller:

This will confirm our telephone conversation this date wherein we discussed the Commission's processing of your cases. I specifically informed you that the Commission has completed its investigation of your cases and will be submitting to the District Director for a final determination. I also informed you that your cases were reviewed by a Committee comprised of myself, my supervisor, the Compliance Manager and two Senior trial attorneys. A consensus was reached that the evidence presented did not meet the legal requirements for a "cause" determination.

Regarding the promotion, the Committee concluded that you were not qualified for the position of Maitre D' by the standards set by Respondent. Therefore, your qualifications were not comparable to the others who were selected. Regarding the retaliation charge, the Committee concluded that your continually expressed dissatisfaction

with Respondent did not constitute a protest of discrimination as required by Title VII. Therefore, your discharge could not be shown to be retaliatory.

As we discussed, you will be submitting additional information for the District Director to consider. Please do so within the next five working days.

Sincerely,

/s/ Sandra Avila
Sandra Avila
Equal Opportunity Specialist

PROOF OF SERVICE BY MAIL
[CCP §1013A, 2015.5]

I, declare that:

I am employed in the City and County of San Francisco; I am over the age of eighteen years and not a party to the within cause; my business address is One Maritime Plaza, Suite 2500, San Francisco, California 94111-3574.

I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service.

On October 16, 1989, I served a true copy of the within **DECLARATION OF ROBERT D. LINKS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND, IN THE ALTERNATIVE, MOTION FOR A MORE DEFINITE STATEMENT** on the parties in said cause by placing in a sealed envelope with postage thereon fully

prepaid, in the United States mail at San Francisco addressed as follows:

Phyllis Miller
6440 Wornall Road
Kansas City, Missouri 64113

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on October 16, 1989 at San Francisco, California.

/s/ Karen Greer
KAREN GREER

Supreme Court, U.S.
FILED
JAN 19 1994
OFFICE OF THE CLERK

No. 93-659

IN THE

Supreme Court of the United States

October Term 1993

PHYLLIS MILLER,

Petitioner,

v.

DINO LA ROSA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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January 19, 1994

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Respondents' opposition ("Opp.") to the petition for certiorari ("Pet.") demonstrates why the decision of the Ninth Circuit in this case merits review by this Court. Respondents do not dispute that the Circuits are split on the question presented—whether agents of the employer can be held personally liable for their discriminatory acts under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act ("ADEA"). Opp. 23; *see* Pet. 15-22. Nor do respondents dispute that the question presented is an important question of Federal law. *See* Pet. 23-25.

As the Equal Employment Opportunity Commission ("EEOC") argued below, the Ninth Circuit panel "issued a sweeping and unprecedented decision removing an entire class of defendants from coverage under Title VII and the ADEA". Brief of the Equal Employment Opportunity Commission as

Amicus Curiae in Support of the Petition for Rehearing with Suggestion for Rehearing En Banc, at i, *Miller v. Maxwell's International*, No. 90-16286 (9th Cir. June 4, 1993).

Instead, respondents engage in a personal attack on petitioner and rely on a purported jurisdictional defect in the court below as support for their argument that this Court should grant the petition and vacate the judgment below. The court's decision that it possessed jurisdiction, however, was entirely correct. It does not provide grounds for the Court to deny the petition or to summarily vacate the judgment on jurisdictional grounds but, if anything, provides yet another reason why this Court should grant certiorari.[1]

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[1] Instead of responding to the legal questions presented in the petition, respondents devote their brief to a personal attack on petitioner. The attack is both false and irrelevant to the question whether this Court should grant review. Respondents criticize petitioner for being a "ring-wise, litigation savvy petitioner" (Opp. 22) and "a crafty litigant" (Opp. 23) and at the same time for filing papers that were "virtually incomprehensible". Opp. 5. The truth is that petitioner has merely sought to enforce her rights, and was proceeding entirely without the assistance of counsel until her petition in this Court. Although respondents criticize petitioner for filing complaints with the EEOC and for appealing to the Ninth Circuit and seeking review in this Court (Opp. 12-13, 22), the complaints with the EEOC were a prerequisite to her action under Title VII (42 U.S.C. § 2000e-5(e)(1) (1988)) which she had every right to appeal. Moreover, while respondents seek to attach some significance to the EEOC's letter and respondents' own memos, petitioner alleges that the letters were pretextual and it is well established that the fact that the EEOC issues a right to sue letter rather than pursuing the action itself does not impugn the merits of the underlying action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973).

Respondents' brief contains numerous other inaccuracies. We respond to only some of them here. Petitioner is not a former waitress but was employed initially as a hostess and promised a promotion by respondents. (App. E-8, ¶¶ 35-36) The restaurant did not close in 1987. Opp. 5. Petitioner submitted her EEOC records to the court and respondents, as the district court docket reflects. Opp. 11. Finally, the arbitral award authorized by the bankruptcy court and paid to Miller does not constitute compensation for the unlawful acts forming the basis of this action. Petitioner seeks substantial relief and suffered substantial injury (App. E-12, ¶ 67), but did not have the opportunity to prove her entitlement to that relief because of the holding of the court below that agents of the employer could not be held liable under Title VII or ADEA.

I. THE PERSONAL LIABILITY OF AN AGENT OF AN EMPLOYER UNDER TITLE VII AND THE ADEA IS AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHICH THE CIRCUIT COURTS ARE SPLIT.

As we argued in the petition and the EEOC argued below, the Ninth Circuit's decision undermines the deterrent and compensatory objectives of both Title VII and the ADEA statutes, removes an entire class of defendants from coverage under those statutes, and would preclude victims of discrimination from obtaining any relief in many cases—including cases of sexual harassment in which the corporate employer cannot itself be held liable. Pet. 23-25. The Circuit courts have split on the question presented, with five Circuits holding that agents of the employer can be held liable under Title VII or the ADEA. Opp. 23; Pet. 15-22. [2]

Respondents do not dispute that the question presented is an important question of Federal law or that the Circuit courts are in conflict. Rather, they argue on the merits that the Ninth Circuit was correct—and the other Circuits presumably incorrect—in its interpretation of Title VII and the ADEA. That argument, however, even if it were correct, does not provide grounds for denying the petition for certiorari. Five Circuits have held otherwise and the question is ripe for this Court's review. Unless this Court grants the petition, the protection accorded employees within the largest Federal Circuit will be markedly less than that accorded employees in the rest of the country.

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[2] Two more district courts have followed the Ninth Circuit's holding in *Miller* since approximately the date of the petition. *See Henry v. E.G.&G. Missouri Metals Shaping Co.*, No. 93-1206, slip op., 1993 WL 479747, at *2 (E.D. Mo. Nov. 19, 1993) (noting that the "federal courts are divided on the issue of personal liability, especially with regard to supervisors, under Title VII" and refusing to hold supervisor individually liable); *Bramesco v. Drug Computer Consultants*, 834 F. Supp. 120, 123 (S.D.N.Y. 1993) ("Title VII and the ADEA are directed toward employers, not individual natural persons who are not themselves employers, at least absent separate intentional misconduct"; citing *Miller*).

In any event, respondents are not correct in their interpretation of Title VII and the ADEA. Respondents argue, in essence, that because the substantive provisions of Title VII and the ADEA subject only the "employer" to liability, Congress did not intend agents of the employer to be held liable. Opp. 19-20. In Title VII and the ADEA, however, Congress explicitly defined the term "employer" as used in the substantive provisions to include "any agent" of the employer. Section 701(b) of Title VII, 42 U.S.C. § 2000e-1 (1988); Section 11 of ADEA, 29 U.S.C. § 630(b) (1988). Moreover, as we have noted (Pet. 21-22), this Court has held that Congress intended the term "employer" in a closely related context to include any person with "substantial control of the terms and conditions of the work" of employees. *Falk v. Brennan*, 414 U.S. 190, 195 (1973). Thus it is clear that the employer who is prohibited from engaging in employment discrimination under Title VII and the ADEA includes "any agent" of the employer. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). That Congress could have written the statutes differently provides no justification for ignoring the plain and natural meaning of Congress' words as it wrote them.[3]

Moreover, if Congress had written the statute as respondents suggest, it could not have achieved the objective it plainly intended to achieve in Title VII or the ADEA. Respondents suggest that if Congress had intended agents of the employer to be held liable, it would have written Title VII and the ADEA to say "no person shall discriminate in the workplace". Opp. 19-20. That language, however, would have subjected to liability not only supervisory employees such as respondents but also co-workers and other persons not agents of the employer whom Congress did not intend to hold liable under Title VII and the

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[3] Respondents' argument asks the Court to ignore the definition of "employer", a definition Congress intended to incorporate in the substantive provisions of Title VII and the ADEA. If that definition were not applicable to the substantive provisions, "employers" not engaged in "an industry affecting commerce" and employers with fewer than 15 employees would be subject to Title VII and the ADEA, a result that Congress plainly did not intend.

ADEA. Thus, the fact that Congress did not write Title VII and the ADEA to make "any person" liable for discrimination does not provide a reason for denying the writ.

II. THE NINTH CIRCUIT CORRECTLY HELD THAT IT POSSESSED JURISDICTION.

Respondents' principal argument is not that the question presented by petitioner is not worthy of review by this Court but rather that the Ninth Circuit erred in holding that it possessed jurisdiction.[4] Respondents argue that even though petitioner relied on assurances by the district court that her Rule 59(e) motion was timely, the time for filing her appeal was not tolled because petitioner did not receive "'specific assurance' by a judicial officer that an appeal ha[d] been perfected". Opp. 16.[5] Thus, respondents argue that this Court should grant the petition and vacate the judgment below for lack of jurisdiction. Opp. 18. Thus, as respondents concede, the jurisdictional question they pose at most provides an additional reason to grant the petition for certiorari.

However, the Ninth Circuit's decision that it possessed jurisdiction was correct. This Court has held that the time for filing a notice of appeal may be tolled where a party has performed an act which if properly done would postpone the deadline for filing an appeal and has received specific assurance from a judicial officer that the act has been properly done. *See Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962); *Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384, 387 (1964); *Wolfsohn v. Hankin*, 376 U.S. 203 (1964); *see also Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989). In *Thompson*, for example, the Court held that the time for appellant to file his notice of appeal was tolled by the district court's statement that appellant's post-trial motions were

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[4] Respondents concede that this Court has jurisdiction. Opp. 1.

[5] Respondents argue that the "sole exception to the strict application of jurisdictional time limits is the unique and isolated case in which a court mistakenly says to a party 'don't worry. Your appeal has been perfected.'" Opp. 17.

filed "in ample time" even though the court's statement was erroneous. *Thompson*, 375 U.S. at 386. The Court stated: "petitioner did an act which, if properly done, postponed the deadline for the filing of his appeal[,] . . . the District Court concluded that the act had been properly done[, and] . . . the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline." *Id.* at 387.

Similarly, in *Wolfsohn v. Hankin*, 376 U.S. 203, the Court held that the time to appeal was tolled by a district court order extending the time for plaintiff to file a motion for rehearing under Fed. R. Civ. P. 59, even though the district court did not have power to extend the time for filing such a motion. The plaintiff relied on that order in waiting until after the disposition of the motion to appeal. *See Wolfsohn*, 376 U.S. 203, *rev'g*, 321 F.2d 393 (D.C. Cir. 1963).[6]

The Ninth Circuit's holding here constitutes a straightforward application of *Thompson* and *Wolfsohn*. As the court found, petitioner filed an application for an extension of time to file a Rule 59(e) motion and the district court granted that application well within the time to file a notice of appeal. Petitioner relied on the district court's order in not filing her notice of appeal until after the resolution of the Rule 59(e) motion. If the court had denied that application, petitioner would have had ample time in which to file a notice of appeal or to file a motion to extend the appellate filing deadline. Under *Thompson* and *Wolfsohn*, she cannot be faulted or penalized for relying on the district court's order in waiting until after the disposition of her Rule 59 motion to file an appeal. (App. A-4.) *See also Fairley v. Jones*, 824 F.2d 440, 442 (5th Cir. 1987) ("Under *Wolfsohn* the reliance of a pro se litigant, like Fairley, on the magistrate's extension of time constitutes unique circumstances justifying our exercise of jurisdiction"); *Stauber v. Kieser*, 810 F.2d 1 (10th Cir. 1987) ("by

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[6] Indeed, the facts here are more compelling than those in *Wolfsohn*. While the plaintiff in *Wolfsohn* was represented by counsel who could have been expected to question the district court's order, petitioner here was *pro se*. *See Fairley*, 824 F.2d at 443.

granting an extension and then accepting the Rule 59(e) motion, the district court led plaintiffs to believe that those actions were properly done"); *Butler v. Coral Volkswagen, Inc.*, 804 F.2d 612, 617 (11th Cir. 1986) ("As in *Wolfsohn*, appellant here reasonably relied on an erroneous district court order granting an extension of time to file a new trial motion"); *Inglese v. Warden, U.S. Penitentiary*, 687 F.2d 362, 363 (11th Cir. 1982) (same).[7]

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[7] We recognize that the Circuit courts are split on the question of the scope of *Osterneck* and that some Circuits would not toll the time for appeal when an attorney relies on an extension of time to file a Rule 59(e) motion. *Compare Fairley*, 824 F.2d at 442 (appellant reasonably relied on district court order extending time to move under Rule 59(e)); *Inglese*, 687 F.2d at 363 (same); *Butler*, 804 F.2d at 617 (same); *Stauber*, 810 F.2d at 1 (same); *Aviation Enters., Inc. v. Orr*, 716 F.2d 1403, 1406 n.25 (D.C. Cir. 1983) ("Courts long have permitted parties to maintain otherwise untimely appeals in 'unique circumstances'—those in which the appellant reasonably and in good faith relies upon judicial action seemingly extending the appeal period, provided that the court's action occurs prior to expiration of the official period and that the appellant files a notice of appeal before expiration of the period apparently judicially extended"); *Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n*, 781 F.2d 935, 945 n.3 (D.C. Cir. 1986) (Ginsburg, J. dissenting) (discussing "unique circumstances" doctrine); and *Prudential-Bache Sec., Inc. v. Fitch*, 966 F.2d 981, 986 (5th Cir. 1992) (reliance on clerk's notice that order was entered presents "unique circumstances") *with Feinstein v. Moses*, 951 F.2d 16 (1st Cir. 1991) ("Even if we assume Feinstein learned on November 15th that this motion was granted and, based on that order, opted to forgo filing his notice of appeal at the last minute, application of the unique circumstances doctrine would still be unwarranted"); *Pinion v. Dow Chem., U.S.A.*, 928 F.2d 1522, 1533-34 (11th Cir.), *cert. denied*, 112 S. Ct. 438 (1991) (unique circumstances doctrine not applicable where attorney "inadvertently overlooked" prohibition against extending time for Rule 59(e) motions); *Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360, 1365 (3d Cir. 1990) (unique circumstances doctrine not applicable where failure to timely file was result of the "party's own misreading of the applicable law" and party's conduct was unreasonable in its totality); and *Green v. Bisby*, 869 F.2d 1070, 1072 (7th Cir. 1989) ("mere entry of a minute order [by a magistrate] . . . is not an act of affirmative representation by a judicial officer as contemplated by *Osterneck*"). Even if those cases could be applied to the reliance of a *pro se* plaintiff, at most the argument that respondents advance would constitute a reason to grant certiorari and not a reason to deny the writ, as respondents themselves suggest. Opp. 18.

The error in respondents' argument lies in its equation of the specific assurance required by *Osterneck* and *Thompson* with "'specific assurance' by a judicial officer that an appeal has been perfected". Opp. 16. As respondents acknowledge, the Court in *Osterneck* held only that the *Thompson* doctrine applies "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done", *Osterneck*, 489 U.S. at 179—a formulation almost identical to that in *Thompson*. That standard was not satisfied in *Osterneck* because the petitioners there had received no specific assurance that the act was properly done—they relied on an implication that could be drawn from the district court's actions.[8] In this case, however, the district court specifically assured the *pro se* petitioner that her Rule 59(e) motion was timely and accepted that motion within the time for moving to extend the appellate filing deadline. Petitioner's reliance on that specific assurance in not filing her notice of appeal until after resolution of the Rule 59(e) motion thus tolls the time for appeal. The Ninth

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[8] In *Osterneck*, the Court of Appeals described the Osternecks' reliance argument as follows:

> "The Osternecks contend that they have relied upon several actions of the district court which indicated that the January 30, 1985 judgment was final and appealable. These include the district court's subsequent orders granting E & W's bill of costs, denying E.T. Barwick's motion for an extension of time to file its bill of costs, and denying E.T. Barwick Industries' motion to stay the execution of the January 30 judgment. In addition, the clerk of the district court required the Osternecks to pay an additional filing fee for their notice of cross-appeal filed after the district court's July 9 amended judgment. The Osternecks argue that this requirement indicates that the clerk did not treat the Osternecks' motion for prejudgment interest as a motion under Rule 59. Had the clerk believed that a Rule 59 motion had been made he would have acted pursuant to Fed. R. App. P. 4(a)(4) which provides that no additional fees shall be required for a second notice of appeal filed after a Rule 59 motion has been ruled upon. Finally, the Osternecks contend that they relied upon this court's failure to originally notify them that jurisdiction was questionable."

Osterneck v. E.T. Barwick Indus., Inc., 825 F.2d 1521, 1527 (11th Cir. 1987), *aff'd*, 489 U.S. 169 (1989).

Circuit's jurisdictional holding does not provide grounds to deny review of a decision that conflicts with that of numerous other Circuits and that would deprive all discrimination victims of the right to sue those persons who have discriminated against them.

CONCLUSION

For the foregoing reasons and the reasons stated in petitioner's opening brief, the petition for a writ of certiorari should be granted.

January 19, 1994

Respectfully submitted,

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